

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

Criminal Appeal  
Case No. 18/927 CoA/CRMA

**BETWEEN: SAM KASAURA**

Appellant

**AND: PUBLIC PROSECUTOR**

Respondent

**Coram:** *Hon. Justice Bruce Robertson  
Hon. Justice Oliver Saksak  
Hon. Justice John Mansfield  
Hon. Justice David Chetwynd  
Hon. Justice Gus Andrée Wiltens*

**Counsel:** *Mrs. Jane T. Aru for the Appellant  
Mrs. Bertha Pakoasongi for the Respondent*

**Date of Hearing:** *Friday 13<sup>th</sup> July 2018*

**Date of Judgment:** *Friday 20<sup>th</sup> July 2018*

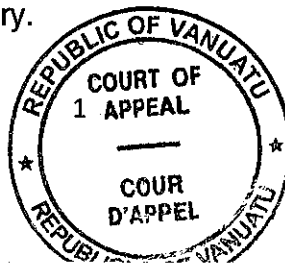
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**JUDGMENT**

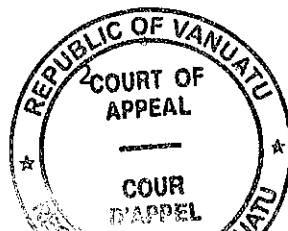
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**Introduction**

1. On 11 June 2017, Sam Beau was killed by a group of eight men in Kaunameiken Village on Tanna.
2. In that village, there had been an ongoing dispute about the use of roofing iron donated after Cyclone Pam. Roofing iron was important for catching water. There was a belief that Sam Beau's family were using roofing iron belonging to the community.
3. Early that morning, Sam Kasaura Jnr, the son of the appellant, was walking to church with his wife and children. He saw Felix Beau, the sons of Sam Beau and Sam Capen carrying some roofing iron through the village. He confronted them, and in the argument that followed Felix stabbed Sam Jnr in the hand with a knife causing him serious injury.



4. The wife of Sam Junior called out for help and a number of men came to assist. They chased Felix and Brian Beau and Sam Capen (all sons of Sam Beau), who ran towards the house of Sam Beau, but were not able to catch them. The chasing group entered the house of Sam Beau, and assaulted him, resulting in his death.
5. Each of those eight men, including Sam Kasaura Jnr, were subsequently charged with the intentional homicide of Sam Beau. The eight accused were Noanapek Iawiko, Raka Nawei, Tomle Katmatum (Nawei), Iesut Nawei, Mathew Nawei, Manasa Ieru, Andrew Ireu and Sam Kasaura Jnr.
6. They each pleaded not guilty to that charged. After a full trial, on 19 March 2018 they were each found guilty other than Iesut Nawei, and have been sentenced to terms of imprisonment.
7. Chief Sam Kasaura (called on this appeal Sam Kasaura Snr – as we will adopt in this judgment) and Chief Peter Nanuman were each charged with counselling and procuring intentional homicide contrary to section 106 (1) (a) and section of the Penal Code Act [Cap 135].
8. In the case of Sam Kasaura Snr, it was said that between 7 and 11 June 2017 at Kaunameiken Village, Tanna he counselled and procured the eight principal accused to unlawfully assault Sam Beau with the intention of causing his death when he called for his death on 8 June 2017. He is the father of Sam Kasaura Jnr.
9. He was convicted of that offence, and was sentenced to a term of imprisonment.
10. This appeal is only from that conviction of Sam Kasaura Snr. Consequently it is necessary to focus only on the evidence, the findings and the reason for his conviction.
11. Chief Peter Nanuman was acquitted of the charge against him.
12. The judgment is a careful and thorough expression of the relevant law, the evidence, and findings.



13. It is clear that the incident in the morning of 11 June 2017 was one of the motivating events leading to the death of Sam Beau.
14. The trial judge found that was the case.

### **Grounds of Appeal**

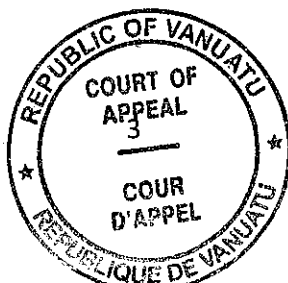
15. There are four grounds of appeal:

They are:

- 1) The trial judge erred by drawing adverse inferences against Sam Kasaura Snr from his failure to give evidence and so his lack of explanation.
- 2) The trial judge erred in applying the standard of proof in finding Sam Kasaura Snr guilty of the offence.
- 3) The trial judge failed to include reasonable hypothesis consistent with innocence.
- 4) The verdict of guilty in relation to Sam Kasaura Snr was not supported by the evidence.

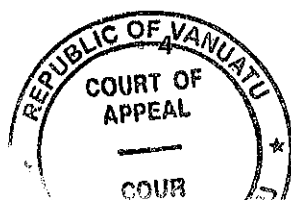
### **The Judgment**

16. After the introductory remarks, the judgment has a section "Burden of Proof."
17. It is both appropriate and correct. No section of it was criticized by counsel of Sam Kasaura Snr.
18. There is a section on "Elements of offences."
19. Again, it is both appropriate and correct. No section of it was criticized by counsel for Sam Kasaura Snr.



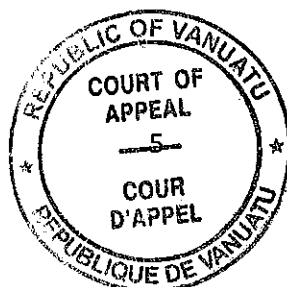
20. The next section summarises the evidence and the cases of both the prosecution and the defendants. For present purposes, we focus only on the particular matters concerning Sam Kasaura Snr.
21. The Public Prosecutor alleged that on 8 June 2017, Sam Kasaura Snr in the Kaunameiken Nakamal announced to the principal accused that if they saw any member of Sam Beau's family in the garden, they should kill them.
22. The recital of the evidence left no real doubt about what generally happened (as briefly described above) on 11 June 2017. It was a vicious and prolonged assault on Sam Beau, leading to his death. The individual accused who gave evidence did give different versions about their roles.
23. The only witness who gave evidence to what happened in the Nakamal on 8 June 2017 was Dominique Dick. His unchallenged evidence ( as summarised in the judgment) was:

*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*

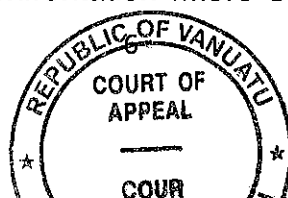


*grandfather stated "sipos oli meetim anyone lo garden killem hem I dead." He did not know that there were dispute between Sam Beau and his grandfather (Sam Kasaura) over iron sheets.*

24. After ruling that a prima facie case was made out at the close of the prosecution case, the trial judge read section 88 of the Criminal Procedure Code [CAP 136] and explained it. Each of the accused persons was legally represented.
25. Then Sam Kasaura Snr and Peter Chief Nanuman through their counsel announced that they were to exercise their right to silence.
26. The defences of the principal accused persons explained their case. It was that the assault on Sam Beau was self-defence, or was provoked. It included the allegation that Sam Beau had cut the right arm of Sam Kasaura Jnr when he was first confronted by Sam Kasaura Jnr. It was also disputed that the principal accused persons had acted in concert, and to some degree there was a dispute about their individual involvement and individual actions.
27. The witnesses called by the defence, as recorded in the judgment, did not give any evidence referring to Sam Kasaura Snr or to what happened at the Nakamal on 8 June 2017.
28. The following summary of their evidence is taken from the judgment. It does not represent the findings made by the trial judge.
29. Evidence was given by Sam Kasaura Jnr. He described the critical confrontation, when he asserted Felix and Brian Beau should not be handling the iron sheets, the ensuing fight when he was injured by Felix and Brian Beau, chasing them (with others) towards the house of Sam Beau but losing sight of them, and so going to Sam Beau's house where Sam Beau also injured him, and then the fracas at Sam Beau's house. He heard Sam Kasaura Jnr calling for Felix and Brian, and thought they may be inside. He said he would kill them if they were there because of the iron sheets and tank of the community.



30. Raka Nawei also gave evidence. He also responded to the cries for help from Ruth, the wife of Sam Kasaura Jnr. He did not see the initial confrontation. But saw sheets of iron on the road. He ran passed Sam Beau's house chasing Felix Beau, in the direction Ruth pointed out, because he understood Felix Beau had injured Sam Kasaura Jnr. He did not admit any real role in the events at Sam Beau's house.
31. Tomle Katmatum (Nawei), another of the accused, also gave evidence. He too, responded to the cries for help and when he got there he saw the iron sheets on the road and some blood. Ruth told him Felix and Sam had injured Sam Kasaura Jnr. Then he went to Sam Beau's house looking for them. He did not admit any role in the events at Sam Beau's house.
32. He is the chairman of the Kaunameiken Community. Earlier on 11 June 2017 he had sent his wife to tell Sam Beau about the community meeting later that day. He thought Sam Beau then sent his sons to take the iron sheets.
33. Andrew Ieru, another accused, also chose to give evidence. He too responded to calls for help. He was part of the confrontation between Sam Kasaura Jnr, and Sam Capen and Felix Beau, when they assaulted Sam Kasaura Jnr, and he saw the iron sheets on the road. He saw Felix and Sam Capen run towards Sam Beau's house, and then went elsewhere for help. He did not go to Sam Beau's house or see the fracas there.
34. Manasa Ieru said he first heard cries for help from Sam Beau's house and so he went there. He said he did not go inside and did not see what happened there, other than Sam Kasaura Jnr and his wife and daughter there.
35. Mathew Nawei said he also heard cries for help but arrived after the initial confrontation. She went to Sam Beau's house to kill Felix and Sam Capen, but they were not there. He saw much of the fracas there, although he said he was not involved himself.
36. Ruth the wife of Sam Kasaura Jnr also gave evidence. She was aware of the issue about the iron sheets for the community tank. Which (she said) Sam Beau claimed as his own, and the meeting about that later on that day. She was present at the first confrontation where Sam Kasaura Jnr accused Felix



Beau of wrongly taking the iron sheets, and of Felix injuring her husband. She called for help, and others came to assist. She followed her husband as he chased Felix and Sam Capen to Sam Beau's house. She said her husband spoke to Sam Beau asking where Felix and Sam Capen were, and that Sam Beau stab him and go inside. She saw some, not all of the fracas inside Sam Beau's house.

37. The last defence witness was Iatika Siaka. He lived some distance away. The summary of his evidence does not suggest he made any direct observations.
38. The judgment then records the findings made on the evidence, including observations about credibility of the witnesses.
39. Again, it is not necessary to refer to that section of the judgment except where it specifically relates to Sam Kasaura Snr either directly or indirectly. It is obvious from the convictions of the principal offenders that the trial judge did not accept some of the evidence of the defence witnesses.
40. The general findings about the initial fight and the arrival at Sam Beau's house are set out in the introduction. We note that the trial judge rejected the evidence that Sam Beau had a knife, or used a knife when first confronted by Sam Kasaura Jnr when he angrily came to Sam Beau's house. There was no conduct of Sam Beau on 11 June 2017 which directly provoked the vicious assault on him, or the assault in the house on his younger son Joseph Beau.
41. The specific findings about Sam Kasaura Snr are at [109] – [110] based in Dominique's evidence set out above. It records that others at the Nakamal on 8 June 2017 were Noel, Iesut, Raka, Mathew, "and others."
42. The trial judge then turned to his conclusion. He noted at [125] the prosecution case that the planning to kill Sam Beau had started on 8 June 2017 at the Kaunameiken Nakamal, and that the principal defendants had been present when Sam Kasaura Snr indicated the plan of killing. The prosecution case was that the incident on 11 June 2017 when Sam Beau's sons were carrying the iron sheets had triggered what was planned on 8 June 2017, even though the killing was in the house not in the garden. The defence case for Sam Kasaura Snr was that what happened at the Nakamal on 8 June

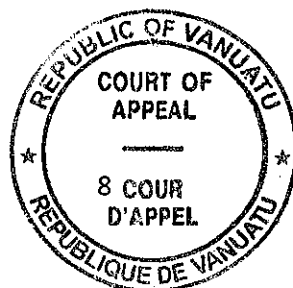


2017 was conditional, and it was not part of a common plan to kill Sam Beau on 11 June 2017. His counsel said the principal defendants acted independently on 11 June 2017, or at least that the trial judge could not be satisfied beyond reasonable doubt that they had acted as they did on that day in part to fulfil any direction Sam Kasaura Snr had given some days before, so that was not part of any common purpose they had on 11 June 2017. He also said it was not shown who was at the Nakamal on 8 June 2017.

43. There was an extensive consideration of recent cases about joint or common purposes in the commission of crimes. The primary judge concluded the law as explained in **Kilman v. Public Prosecutor [1997] VUCA 1** properly states the law. There is no criticism of that conclusion on this appeal.
44. At [178], the trial judge emphasised that the decision of Sam Kasaura Snr not to give evidence did not provide any basis for drawing adverse inferences against him.
45. Then the trial judge said at [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.*

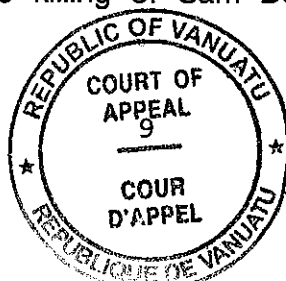
46. The following section of the judgment records the findings about what happened on 11 June 2017.
47. As to the state of mind of the principal offenders at that time, the trial judge discussed the evidence and recorded his conclusions at [180] – [193]. Rather than refer to them in detail at this point, he will refer to them when considering the third and fourth grounds of appeal.
48. The trial judge was satisfied that the order of Sam Kasaura Snr on 8 June 2017 at the Nakamal was a reason for the events on 11 June 2017 leading to the killing of Sam Beau.





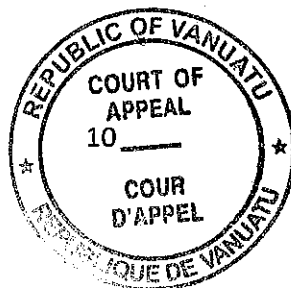
## Consideration

49. The grounds of appeal are set out at [15] above.
50. The first ground of appeal is not made out. It is based on what was said at [179] and quoted above, but in context that does not demonstrate error.
51. The trial judge has correctly identified the onus of proof and the burden of proof in an extensive discussion of that topic. At [179], he has correctly said he can draw no adverse inferences from the silence of Sam Kasaura Snr. Therefore, [179], must mean that, despite his silence, there are other circumstances from which adverse inferences may be drawn
52. In fact, the judgment does not show any adverse inferences were drawn from the fact that Sam Kasaura Snr did not give evidence.
53. The second ground of appeal is also not made out.
54. It is based on the use of the words “highly likely” in [191] of the judgment, as a means of describing the shared state of mind of the principal actors on 11 June 2017 in relation to the statement at the Nakamal on 8 June 2017.
55. That expression is but part of the process of reasoning of the trial judge at [181] – [200] where the trial judge clearly decided that he was satisfied beyond reasonable doubt that the order of Sam Kasaura Snr at the Nakamal on 8 June 2017 was an operative reason for the killing of Sam Beau on 11 June 2017, also triggered by the events earlier that morning.
56. We do not consider the trial judge misunderstood or misapprehended the standard of proof as argued.
57. Grounds 3 and 4 of the grounds of appeal can be considered together.
58. The reasonable hypothesis consistent with innocence is that the events of 11 June 2017 themselves, and independently of the order made on 8 June 2017, were the reason for the killing of Sam Beau. His killing was an act of

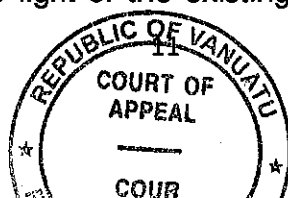


retaliation for the earlier fight, or the stealing of iron sheets, on 11 June 2017 or both of those things.

59. Put another way, as ground 4 does, it is argued that the evidence could not support the finding beyond reasonable doubt that the order of Sam Kasaura Snr at the Nakamal on 8 June 2017 was an operative reason for the killing of Sam Beau on 11 June 2017.
60. There was a further explanation put forward for the killing of Sam Beau on 11 June 2017, namely that Chief Peter Nanuman instructed the principal offenders to do so.
61. The evidence against Chief Peter Nanuman was a statement he had allegedly made to Dominique Dick on the morning of 11 June 2017. The person who had witnessed that statement was not called to give evidence. There was no evidence of Chief Peter Nanuman being in the vicinity on 11 June 2017 at the material times. There was no evidence that any of the principal offenders had been told anything by him.
62. The trial judge found Chief Peter Nanuman not guilty. We see no foundation for asserting (as was said on appeal) that the reason for the killing, or a reason for excluding the relevance of what was said at the Nakamal on 8 June 2017, was anything said by Chief Peter Nanuman.
63. We are, however, concerned that the conclusion that what Sam Kasaura Snr said was reached beyond reasonable doubt in the present circumstances.
64. The onus of proof at all times lay on the prosecution. It called Dominique Dick, whose evidence is referred to above. The prosecution relied on his evidence, and the surrounding circumstances.
65. But, by reason of the accused persons giving evidence, the inferences the prosecution wanted to draw could have been tested. The summary of their evidence is referred to above, although not all of it was accepted and in some instances it was rejected.

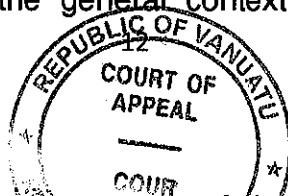


66. Nevertheless, their consistent story was that what each of them did on 11 June 2017 was done because of the fight which took place earlier that morning involving Sam Kasaura Snr.
67. No one was asked about whether they were at the Nakamal on 8 June 2017 (some clearly were there, but not necessarily all of them), or whether they heard the order of Sam Kasaura Snr. None was asked whether they had that order in mind when doing what they did on 11 June 2017. There was also, clearly (as the trial judge found) an ongoing issue in the community about the Sam Beau family taking roofing sheets which were said to belong to the community. It was apparently important enough to have called a meeting for later on 11 June 2017. No one was asked about whether an awareness of that ongoing issue was a reason for their personal conduct on 11 June 2017.
68. The prosecution did not put its case on the significance of the 8 June 2017 order to any of those people who gave evidence.
69. The findings of the trial judge about what happened at the Nakamal on 8 June 2017 cannot themselves be challenged. The evidence of Dominique Dick was accepted, and there was no other evidence that includes the findings that the garden referred to was that of Sam Beau.
70. It also includes the finding (based on that evidence) that Iesut Nawei, Raka Nawei and Mathew Nawei were present. The trial judge said at [181] that also included Sam Kasaura's family who were present. Dominique Dick's evidence as summarised at [40] was that he was at the Nakamal "*with his brothers-in-law and his grandfathers.*" He called Chief Peter Nanuman and Sam Kasaura Snr his grandfathers.
71. The trial judge said at [181] that it was "rational to infer" that all principal defendants were there, and that Sam Kasaura Snr would not have made a statement in the presence of strangers.
72. The trial judge also described the statement as an order to kill in certain circumstances, and having regard to the proximity of the gardens from where the shouting arose, the shouting came from Sam Beau or a member of his family. Especially in the light of the existing dispute between the community



and that family about the iron sheeting, in our view, the step of concluding that order was directed towards Sam Beau and his family was readily available.

73. It is the final step, namely concluding that at the time of the events on 11 June 2017 involving the killing of Sam Beau the principal defendants had in mind the order of Chief Sam Kasaura Snr to kill, that we have concerns.
74. As we have noted, the evidence of the principal offenders did not say that. It said their conduct (so far as each admitted it) was prompted by the fight or confrontation earlier on 11 June 2017 when Sam Kasaura Jnr was injured. The evidence of the confrontation between Sam Kasaura Jnr and the sons of Sam Beau did not, as it was described, involve Sam Kasaura Jnr himself then intending to kill any of those sons of Sam Beau until he was himself stabbed. The evidence of others was that they wanted to avenge the stabbing of Sam Kasaura Jnr. Their first targets were the persons involved in that stabbing.
75. The critical issue is whether, accepting that incident on the road between Sam Kasaura Jnr and the sons of Sam Beau triggered the subsequent conduct, it was shown by the prosecution beyond reasonable doubt that the order of 8 June 2017 was part of the reason – part of the common purpose – for the killing of Sam Beau that day. If it was, clearly the conduct of Sam Kasaura Snr meant that he was complicit in that conduct: **Kilman v. Public Prosecutor [1997] VUCA 1.**
76. We have come to the view that that final step should not have been taken by the trial judge. The onus was on the prosecution. There was no onus of proof on Sam Kasaura Snr. The prosecution did not explore the state of mind of any of those who gave evidence, or about what they had heard or understood from the order at the Nakamal on 8 June 2017, or whether any of the things they had each done on 11 June 2017 were done in part because of what they heard or understood at the Nakamal.
77. Given the state of the evidence, and having regard to what had not been asked of the accused persons who gave evidence, in our view there was a reasonable possibility that the actions of the principal offenders on 11 June 2017 were driven by the initial altercation between Sam Kasaura Jnr and the sons of Sam Beau, in the general context of the altercation happening



because the Beau family was suspected of stealing roofing irons from the community. The order of Sam Kasaura Snr of 8 June 2017 may have played a part, but we do not consider that that was proved by the prosecution beyond reasonable doubt.

78. The appeal is allowed. The conviction of Sam Kasaura is set aside. He released from custody forthwith.

**DATED at Port Vila, this 20<sup>th</sup> day of July, 2018.**

**BY THE COURT**

**Justice Bruce Robertson**

