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

Criminal Appeal
Case No 18/1715

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| IN THE MATTER OF | an appeal from the Supreme Court of the Republic of Vanuatu |
| BETWEEN | Raymond Pakoa<br>Appellant |
| AND | Public Prosecutor<br>Respondent |
| CORAM : | Chief Justice V Lunabek<br>Justice J Hansen<br>Justice D Fatiaki<br>Justice G Andrée Wiltens<br>Justice S Felix |
| COUNSEL: | J Aru — Counsel for Appellant<br>K Mackenzie and M Taiki — Counsel for Respondent |
| DATE OF HEARING: | 9 July 2019 |
| DATE OF JUDGMENT: | 19 July 2019 |

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**JUDGMENT OF THE COURT**

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[1] The appellant was charged with premeditated homicide, contrary to s 106(1) (b) of the Penal Code. It is said that with premeditation he killed Flora Jerry, on 3 August 2017. He

pleaded not guilty, but was found guilty at trial by Chetwynd J and ultimately sentenced to 23 years' imprisonment. It is accepted by both counsel that the single live issue at trial was whether or not the killing was premeditated.

[2] The appellant appealed against conviction and sentence. The appeal against sentence was abandoned. A large number of grounds of appeal have been raised, but for reasons that will follow the most significant relate to alleged inadequacies of the record of proceedings in the Supreme Court, such as they deprived the appellant the ability to effectively exercise his right of appeal; and the definition of premeditation.

**Background facts**

[3] The appellant and the deceased were in a relationship. Clearly it was troubled, and could fairly be described as abusive. Attempts had been made to mediate earlier difficulties by customary means, which we will comment on in due course. The night of the killing, which occurred in the early hours of the morning, the appellant attacked and head-butted the deceased. There apparently had been an argument relating to money he was giving to the mother of two young boys from a previous relationship. In any event, in the early hours of the morning he decided to leave, one reason being given that he would need to arrange compensation for the head-butt incident.

[4] It was his evidence that, because he was not a local, he could be in danger, and he took a knife from the kitchen with him. Not unnaturally, the only evidence of what followed came from the appellant himself. He said that the deceased followed him, abusing him and finally saying he could "*go and fuck his sister*". He said he turned and attacked the deceased, thinking he stabbed her twice. He said in his police caution statement that this was spontaneous and he had not intended to kill the deceased only to "*spear*" her. In fact, he had stabbed her four times with considerable force. The pathologist noted that the wounds penetrated muscle fat and bone. The most serious wound severed the carotid artery. It was this that led to her death. The pathologist said in unchallenged evidence that at least one of the blows was struck from behind. The appellant ran away and was ultimately apprehended by the police. He maintained throughout his interview and his evidence that it was not his intention to kill the deceased, and his act was not premeditated.

[5] Before turning to the problems with the record, we will deal with the definition of premeditation. This is the subject of Ground 4 of the points of appeal.

**Premeditation**

[6] The trial Judge referred to a recent decision of the Chief Justice.[1] He set out from that decision:

> Any premeditated design means that there was a conscious decision to kill. The decision must be present in the mind at the time the act was committed.

[7] He further cited from that same decision :

> The decision to kill must be present in his mind at the time the act was committed. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the act.

[8] The trial judge went on to state, correctly, that premeditation is not the same as planning. Although he accepted, if there was evidence of planning, it would be compelling evidence of premeditation.

[9] The defence case clearly was that the four stab wounds were perpetrated in quick succession in a fit of rage due to provocation from the deceased.

[10] It is then submitted on behalf of the appellant that the passages relied on from *Namri* are incomplete, and the matters set out at paragraph 3 of the verdict do not properly represent the law in relation to premeditation. It is said, therefore, that the trial Judge erred in the definition he adopted.

[11] It is correct that the second passage cited is incomplete, and in full reads:[2]

> [107] The decision to kill must be present in his mind at the time the act was committed. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the act. The period of time must be long enough to allow reflection by the Defendant. The premeditated intent to kill must be formed before the act was committed.

[12] At paragraph 3 of the decision, following the citations from *Namri*, the trial Judge continued:

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1 *Public Prosecutor v Johnson Namri* [2018] VUSC 77; Criminal Case 1859 of 2017 (29 May 2018).
2 Ibid at [107].

> Premeditation is not the same as planning. Obviously if there is evidence of planning the act then that would be compelling evidence of premeditation. However it is clear there can be premeditation without planning. As the Chief Justice says, premeditation involves a decision made **at or before** the act. (our emphasis)

[13] It can be seen that this was not what the Chief Justice said, and indeed does not reflect the statutory provision which is defined in s 106(2) of the Penal Code:

> For the purpose of subsection (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.

[14] *Namri* was appealed unsuccessfully.[3] Relevant to this case the Court of Appeal stated:

> [22] First, an accused intended to kill; second, the intention to kill was formed before the killing (premeditation)...

[15] It is clear that premeditation is a decision made before the act. We concur with counsel that the Judge in this case, when he spoke of "*at or before the act*", incorrectly stated the test. The correct test is that set out by the relevant statutory provision as expanded on by Chief Justice in *Namri.*

[16] We concur with the respondent that it is not helpful to overly focus on the temporal element alone but rather on all the relevant overall circumstances established by the evidence. However, we do not agree with the respondent's submission, which we understood to be that the force of an attack, such as we have here, on its own amounts to premeditation. Such an approach in a case such as this could lead to an impossible situation of attempting to determine whether premeditation existed at the time of the first blow. With multiple stab wounds, such as here, it would be almost impossible to establish what blow was first to make the suggested assessment.

[17] The premeditation needs to be before the act. It could be immediately before such as where an attacker yelled "*I am going to kill you*" and then attacked. Or it could be established at an earlier point of time, or over a period of time, by a single event or a series of events proved on the evidence. Each case will depend on its own unique facts.

[18] The last two sentences of *Namri* at [11] above must be considered. But there is no specific time frame that must be adhered to. It is necessary to consider the fluid nature of many

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3 *Namri v Public Prosecutor* [2018] VUCA 52; Criminal Appeal Case 1634 and 2507 of 2018 (16 November 2018).

homicidal attacks and take into account all the relevant evidence to ensure that premeditation existed at the time of the attack.

[19] Although the judge wrongly stated the test for premeditation we are satisfied the critical issue is how the judge ultimately applied the test in this particular case. We will return to that.

**The record**

[20] As with all criminal trials in Vanuatu, the official record is the hand-written notes of the Judge. The Judge has responsibility to record submissions and evidence and cross-examination. We acknowledge what an extremely onerous task this is for a trial Judge, but currently, and for a long time, that is the system that applies.

[21] A further complicating factor in this case is that the trial Judge is no longer a Judge of the Supreme Court of Vanuatu, and in fact has left the jurisdiction some time ago. However, we are puzzled as to why neither the appellant nor respondent attempted to have the Registry contact the Judge to see if he could assist.

[22] The purported problem with the record was addressed by the appellant having the Judge's former associate do her best to type up his hand-written notes. She did this and it is apparent that where she cannot decipher words at all there are a long line of full stops. Clearly the associate did her very best, but a reading of the typed version shows there were a number of places where she could not decipher a word and inserted the full stops to show that.

[23] The appellant's counsel referred to a number of authorities relating to the state of a hand-written record. It is enough to cite from the South African decision of *S v Van Staden*, where the High Court held at [4] and [5]:[4]

> 4. Where an accused has the right to appeal and a missing or incomplete record makes it impossible to consider and adjudicate such appeal, the conviction or sentence will often be set aside...
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> 5. The mere fact that the record of proceedings might be lost or incomplete would not, however, automatically entitle an accused to the setting aside of a conviction or sentence.

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4 *S v Van Staden* (105/2007) [2008] ZANCHC 45; [2008] 3 All SA 476 (NC); 2008 (2) SACR 626 (NC) (28 March 2008).

5.1 Such relief will only be granted where a valid and enforceable right of appeal is frustrated by the fact that the record is lost or incomplete and cannot be reconstructed (see *S v K* [1991 (2) SACR 190 (B))] at 192i-194b, *S v Ntantiso and Others* 1997 (2) SACR 302 (E) and *S v Leslie* 2000(1) SACR 347 (W) at 353 D-E.

[24] We agree that is an appropriate statement of the approach to be taken. In Vanuatu the position relating to the recording of evidence is covered by s 126 Criminal Procedure Code (CPC) that states :

> ...and the judge of such a court shall take down the evidence or the substance thereof in accordance with such Rules.

[24] How that is achieved in practice is set out at [20] above. The record needs to be considered in the light of *Van Staden* discussed above. We note the respondent's written submission *"That the judgment contained a record of the "substance"* of the evidence." Clearly the verdict cannot be a record of the evidence as Ms Mackenzie conceded in oral argument.

[25] While the record may be short of perfection we do not accept the appellant's submission. It is not as incomprehensible as claimed. That became apparent in the course of the hearing when matters that were said by the former associate to be indecipherable were able to be read by members of the Court.

[26] Here a perusal of the record shows that the judge recorded the openings of counsel. The substance of the evidence in chief is recorded. Cross examination is recorded. Questions start with a "?" and then answers are shown on the following lines. In addition to the matters that the Court deciphered itself in many circumstances where questions are shown by the associate as a series of full stop and therefore indecipherable the question is readily apparent from the context.

[27] It is unnecessary to refer to each and every passage of the record put forward in the appellant's submissions. While not perfect it meets the requirements of s126 CPC. We have made a close and earnest assessment of the record. In *Van Staden* terms we do not find the record frustrates "a valid and enforceable ground of appeal". That is especially so here given the view we have taken as to other grounds of appeal.

**Other grounds**

[28] We will now turn to consider the various other grounds of appeal submitted. We will not necessarily deal with those in the order of the written submissions.

[29] Grounds one and two of the appeal are that the trial Judge erred in misdirecting himself regarding the onus of proof, and that the finding of premeditation was unsafe and not supported by the evidence. Those grounds flow into other grounds of appeal and evidence specifically taken issue with by the appellant. Ground 1 seems in the main to be based on a submission that the judge used his rejection of the appellant's evidence as proof of the offence.

[30] Turning to the first complaint it turns out that this was in fact an attack on the Judge allowing in the evidence of the appellant's former partner, Manuela, and his finding that the appellant had a propensity for violence and to using a knife during violent attacks. This submission is fatally flawed. At trial there was no objection taken to this evidence, although there was a closing submission the evidence should have been excluded. It was far too late to raise that in closing, and even more so at this stage of an appeal. In any event, we are quite satisfied that evidence is admissible as it's probative value far outweighed its prejudicial effect and established the appellant's propensity to use a knife. We can only assume that a tactical decision was made not to object to the evidence when the witness was called.

[31] The next complaint relates to the evidence of Dr Garae, which includes grounds one and two just mentioned, and also ground six: that the shortfalls in prosecutorial disclosure regarding the evidence of Dr Garae led to trial by ambush and a miscarriage of justice; and ground five: that the Judge erred in misrepresenting certain evidence and ignoring other evidence.

[32] Dr Garae was the pathologist who carried out the autopsy on the deceased. Her report was disclosed. In the course of her evidence she described the stab wound that entered the throat and severed the carotid artery as having come from behind. The complaint is that this was not included in the report and only came out in Court, and the appellant was unaware of the evidence. There was cross examination of the pathologist but the appellant's version of events was not put to her. At 14 the judge said:

> It was not put to Dr. Garae that the wounds she examined could have been caused in the manner the defendant later demonstrated. That is unfortunate because we are now left with two conflicting versions of how the wounds were inflicted.

[33] It is submitted that someone should have put the appellant's case, of leaving the premises and walking away, being abused from behind and turning and carrying out the stabbing, to the pathologist.

[34] Frankly, this is an extraordinary submission. The pathologist was not cross-examined on this point. It is unclear to us who appellant's counsel is now suggesting should have put his case to the pathologist. Apart from the appellant himself, the only one who was sure of his version of events, and that he was going to give evidence, was defence counsel. It was not the responsibility of the judge or prosecution. It was clearly defence counsel's obligation to cross-examine the pathologist on this and put to the pathologist the appellant's version of events. It is far too late to raise this complaint now. One would have expected competent counsel could easily have immediately put the defence case to the pathologist and cross-examined her on the stab wound even if that evidence came as a surprise. If not immediately, it would have been a simple matter to request a short adjournment to take further instructions and prepare to cross-examine the pathologist. Again we can only assume that a tactical decision was made not to cross examine on the defendant's version of events.

[35] Equally nonsensical is the suggestion of prosecutorial misconduct. There is no property in a witness. There was a pathologist's report. It was up to defence counsel to approach and discuss the matter with the pathologist if it was considered necessary. Indeed there was an obligation to do so given the appellant's version of events. There is nothing in these grounds.

[36] Ground 5 is also relied on in relation to the evidence of a customary reconciliation that occurred, attended by the local chief and an August Karis, at which it was said that the appellant had a knife and threatened to kill the deceased. All this was probative evidence that went to the attitude of the accused towards the deceased. It also again establishes he was a man who turned towards knives.

[37] There was no objection to this evidence. Just like the evidence of his previous partner its probative value far outweighs its prejudicial effect. There is also criticism that the Judge appeared not to accept Mr Pakoa's evidence that the abusive nature of the relationship was two-way. A claim often heard from abusive men. This really wraps up a number of matters that were relied on by defence counsel in written and oral submissions. Essentially, as noted

earlier, the position is that it seems to be being advanced that because the Judge rejected the appellant's version of events, he must have relied on that rejection to found a guilty verdict.

[38] The Judge dealt with the appellant's evidence at paragraphs 21 and 22 of the verdict. He stated:

> 21. The defendant said he'd been attacked by the victim's relatives. There was no other evidence offered about any assault by relatives. The defendant also claimed he had been assaulted by a police officer when he was taken to the police station. All the officers involved in his arrest denied any such attack. No other physical evidence was offered by the defence. The defendant's evidence has not been very credible.
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> 22. Taking all the circumstances into account I do not accept the defendant's evidence. I do not accept that he struck out in anger. I do not accept that the victim's behaviour so enraged him that he struck out with a knife in a blind rage. The evidence demonstrates he inflicted at least four stab wounds to the victim, two of which were inflicted with significant force. These were deliberate stab wounds to vulnerable parts of the victim's body. They were deliberate in the sense that they were intended to cause damage to those vulnerable body areas and were aimed at them and they were deliberate it in the sense that they were measured and intentional.

[39] The trial Judge was entitled to reject the appellant's evidence. It is perhaps not surprising it was rejected, as much of it was self-serving.

[40] The real matter is to be sure that the Judge did not use the rejection of the evidence of the appellant in the way alleged in the submission as the basis for conviction. We are satisfied he did not. The law is clear that the finder of fact can consider an accused's evidence and reject it. However, that finder of fact must then return to the prosecution evidence and be satisfied all the necessary elements have been proved beyond reasonable doubt.[5] It would have been better if the Judge had clearly stated that, having rejected the appellant's evidence, he was then turning to consider the prosecution evidence. But we are satisfied that is what occurred, because in the final paragraph of the verdict he states:

> 23. All the evidence leads me to the certain conclusion that during the early hours of the 3rd of August, 2017 the defendant followed Flora Jerry out of their house after he had armed himself with a knife and that he then stabbed her from behind. There was no lawful reason (such as self-defence) advanced or apparent for this attack. It may not have involved any detailed or long term planning but I am sure beyond reasonable doubt that the murder of Flora Jerry was premeditated. The defendant had it in his mind that he was going to stab Flora Jerry to death **before** he did so and at the time that carried out the attack with the knife. I find the defendant guilty as charged. **(our emphasis)**

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5 *Vahirua v Public Prosecutor* [2019] VUCA 17; Criminal Appeal Case 2114 of 2018 (22 February 2019).

[41] By referring to all of the evidence, having just rejected all of the appellant's evidence, it obviously must be a reference to the full body of the prosecution evidence advanced at trial. We are satisfied, from a careful perusal of that evidence which was admitted without objection and considered by the Court, that his finding of premeditation was correct. All of that evidence, back to that of Manuela, through the discussions and the threats made in front of the Chief, to the long-term abusive nature of this relationship, to the argument earlier in the night with the head-butting and the readiness to carry and use knives are all relevant to be considered by the trial Judge. Indeed, we consider the finding he reached in the circumstances of this case to be inevitable.

[42] We do, however, agree with the appellant's submission that matters of post-conduct that occurred in this case do little to assist, if at all, with determining premeditation. But we are satisfied that the rest of the evidence forms a firm foundation of proof of premeditation beyond reasonable doubt.

[43] We said earlier that the Judge wrongly stated the test for premeditation in that he said it "*had to exist at or before the attack*". But from the passage set out above at [40], it is clear that he found that the defendant had that necessary premeditation before the attack. In this case, it could be said to have been formed very quickly, immediately prior to the attack, but there is a lot of evidence of his previous action and threats to support that finding of premeditation. So while he initially wrongly stated the test, he did, in fact, apply the correct test.

[44] In *Ben v Public Prosecutor*, this Court stated:[6]

> This Court has previously stated the test in such cases in *Dovan v Public Prosecutor* and we need cite only one passage:
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> > "We cannot accept that, in deciding if a verdict is unsafe or unsatisfactory, in asking ourselves if we have a lurking doubt, we can or should hear a virtual repeat of the type of arguments usually presented in Counsels' closing speech. The appeal court is not to be regarded simply as an opportunity to have a second bite at the same cherry..... Thus, before it will intervene in such a case, this Court must have some ground for considering the verdict unsafe or unsatisfactory that goes beyond the simple question of whether we feel we might have come to a different conclusion if we had been the trial judge on the appearance of the written record."

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6 *Ben v Public Prosecutor* [1990] VUCA 7; Criminal Appeal Case 03 of 1990 (26 October 1990).

> The conclusion reached by the learned Chief Justice was one that he was entitled to reach on the evidence before him and we see no reason to consider it unsafe or unsatisfactory.

[45] We would also add that the finder of fact has always been considered by appellate Courts to be best placed to make factual findings and findings relating to credibility.[7]

[46] In this case we accept that parts of the verdict could have spelt out the factual findings more clearly. But we do note that on our reading of the conduct of the trial and the opening and closing addresses, the Judge received little assistance from counsel. Even in relation to the record, there is an obligation on counsel to keep their own notes, which could have been used jointly, between both parties, to assist in interpreting the record if that was thought necessary. We do not think that was necessary.

[47] We are quite satisfied the Judge did not misapply the onus and place it on the appellant. He rejected the appellant's account. He then cited from the prosecution evidence as establishing premeditation. He found that occurred before the homicidal act. While he was wrong to consider the post-conduct behaviour, we are quite satisfied there is no miscarriage. As we said, there was ample evidence to support the finding of premeditation before the homicidal act, indeed it was inevitable. We have found the record adequate. We see no reason to interfere with the judge's finding of fact or verdict.

[48] We address the following point for the sake of completeness. In the defence closing, as we have noted, it was submitted to the judge the evidence of the former partner should be excluded. We noted above that the proper time to object to the admissibility of evidence is when the witness is called. If that submission was to suggest the appropriate time is in the closing it is wrong. Whether the trier of fact is a jury, or a judge or magistrate sitting alone, the evidence must be objected to at the time the witness is called. Indeed it would be wise if the grounds of objection are known at the start of the trial for defence counsel to raise it with the judge then. In this case nothing turns on this point as we have found the evidence was properly admissible in any event.

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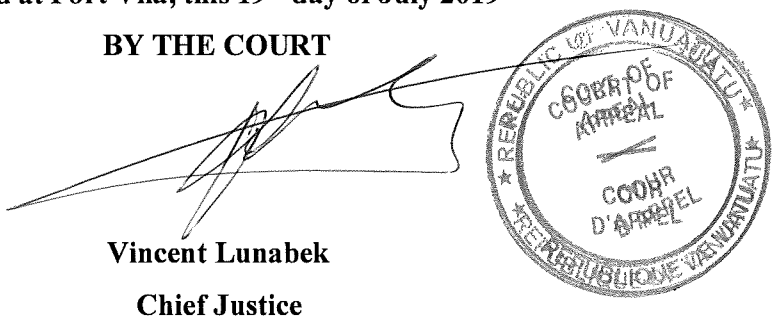
7 *M v R* (1994) 181 CLR 487.

[48] It follows that the appeal against conviction is dismissed.

**Dated at Port Vila, this 19th day of July 2019**

**BY THE COURT**




**Vincent Lunabek**

**Chief Justice**