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

Criminal Appeal
Case No. 21/3862 CoA/CRMA

BETWEEN: **Louris Boihilan**
Appellant

AND: **Public Prosecutor**
Respondent

DATE OF HEARING:	***14 February 2022***
CORAM:	***Chief Justice V Lunabek*** ***Justice J W Hansen*** ***Justice R White*** ***Justice GA Andrée Wiltens*** ***Justice D Aru*** ***Justice VM Trief*** ***Justice EP Goldsbrough***
COUNSEL:	***P K Malites — Counsel for Appellant*** ***T Karae — Counsel for Respondent***
DATE OF JUDGMENT:	***18 February 2022***

JUDGMENT OF THE COURT

1. The appellant was charged that on 3 January 2020 in the Joint Court area, Port Vila, by unlawful act he intentionally caused the death of his partner, Elina Vira. On 4 November 2021, following trial, the appellant was convicted of the lesser offence of the unpremeditated homicide of his partner.

Background facts

2. The deceased, against the wishes of her father, left home and entered into a relationship with the appellant in 2018. They lived on the island of Mota Lava and had two boys. It appears that at some stage they returned to Port Vila and lived with the deceased's family. Evidence was heard of the appellant's mistreatment and violence towards the deceased, and there was also propensity evidence from other women who detailed his actions towards them. There were suggestions in the evidence that he suspected the deceased was involved in extramarital affairs.

Overview of the evidence relating to the offending

3. In October 2019, the appellant travelled to New Zealand for seasonal work. Before travelling to New Zealand, he stayed with his sister who resided in the Joint Court area, which is said to be of relevance because it was in that area that the deceased's body was ultimately found. In November 2019, the deceased travelled to Port Vila to reside with her parents. The same month the appellant returned from New Zealand and re-joined the deceased and her family in Port Vila.

4. There is a body of evidence that the deceased disappeared on 3 January 2020. That day there was apparently an early-morning argument, but in any event the deceased and the appellant left to go to the hospital. Apparently, the family was told that this was so the appellant could undergo a dental check-up. The appellant said it was for a pregnancy test. There was evidence that as they walked towards the bus stop, that the argument was continuing, but there is no evidence of what the argument was about.

5. According to the appellant's record of interview, he called the father of the deceased and said the deceased had gone missing. He said on the way back from the hospital they went for food, and as he crossed the road, he turned back to see the deceased hopping on a bus and leaving. All he could say to the father was the bus was blue. This is also what he told the police and others.

6. Sometime in the afternoon the appellant came home. He refused to eat and went out of the house. He then asked if he could sleep with neighbours, and the woman at the house said it was unusual for him to come at night because he usually came in the daytime. When she asked him about this, he said he and the deceased had been talking (we take this to be a euphemism for arguing) and it was better for him to leave the house.

7. The parents of the deceased went and got the appellant to return to the house to sleep.

8. On 9 January 2020, the appellant went to the police station and spoke to Constable Edmanley and requested that the police should look for the deceased. The constable noted the appellant was "worried and unsettled. I think it because it was his wife who went missing." He requested a photograph of the deceased from the appellant to assist the police with their enquiries. The police did not receive the photograph, and he was unsuccessful when he tried to contact the appellant later to obtain the photo.

9. On 9 January Henry David went to the airport and saw the appellant and asked him what he was doing. He said the appellant said he was just sending parcels to his father, although Mr David saw that the appellant was carrying a big bag at the time. It is common ground that on that day he left Port Vila, despite the father of the deceased saying the appellant told him that that he

would not be flying to Mota Lava until 18 January. The 2 children of the appellant and the deceased were residing on Mota Lava at that time.

10. On the afternoon of 28 January, Mr Arthur Edmanley, who resides at the Joint Court area referred to previously, took his dead dog to a communication tower a few metres from his house. He was on his way to bury the dog when he came across a very nasty smell. He did not believe it could be the dog, as it had just died. He walked down a small slope and saw a lot of flies, and when he peered over, he saw what he thought looked like a man's leg. He left the dog and returned to notify the police of what he had seen.

11. Late in the afternoon, Sergeant Berry attended the scene. It was described as being in the middle of the bush under a big tree, and under a slope that was very secluded. The sergeant noted there were three big, dry logs and a large rock placed on top of the deceased, and that she was face-down, and her legs and right hand were exposed. After removing the rocks, he noticed the deceased was already decomposing, that her hair was about 60 centimetres away from her head and there was no skin over her head. Her right hand was skinless and had a broken wrist, which the sergeant said may have been the result of blunt force trauma during a struggle. Her shirt was torn on the right side, but still intact over her body and breasts. Her pants and panties were intact.

12. The autopsy report was provided by the Forensic Science Service Fiji Police Force. It stated no cause of death could be established due to the extreme stage of putrefaction and partial skeletonisation.

13. Considering all of this circumstantial evidence, the Judge concluded the only inference available to him was that the appellant had killed the deceased by an unlawful act. He then proceeded to convict him of the lesser offence noted in paragraph [1], above.

Submissions

14. In the memorandum of appeal, six grounds were advanced:

    1. That the learned Judge erred in fact and law when he upheld a conviction based on doubtful and insufficient circumstantial evidence;

    2. That the learned Judge erred in fact and in law by failing to properly consider the evidence taken under oath;

    3. That the learned Judge erred by basing his decision on evidence that was not under oath;

    4. That the learned Judge erred by failing to properly consider the onus of proof.

    5. That there was a miscarriage of justice;

6. That the verdict is unsafe and unsatisfactory.

15. In the written submissions filed, the appellant abandoned grounds 4 and 5. At the hearing, the concession regarding ground 5 was withdrawn.

16. In the course of the appellant's submissions, well-established authorities were cited in support of the various grounds. We will return to those in due course.

17. In submitting the Judge erred in fact and law when the conviction was based on doubtful and insufficient circumstantial evidence, the appellant's submissions grouped the evidence as follows.

18. First, relating to the date the deceased was last seen, the evidence from the immediate families of the deceased was that she did not return home from the hospital visit on 3 January. But the submission is that the independent witnesses Alice Ken and Police Officer Caulton Edmanley Jnr had given an alternative date of 8 January 2020. So, the actual date of her being last seen is unproven. They also submit that there were conflicting dates when the deceased was last seen with the appellant because Jimmy Tasava said he saw her at Prima after she disappeared but before her body was discovered. It was submitted there were, therefore, two versions of this event.

19. Secondly, the prosecution case at trial was that the motive for the killing was the appellant's jealous belief that the deceased was having an affair. The appellant submits that the evidence of Ben Vira, on the morning of the 3 January that the appellant and deceased were arguing on the way to the bus stop to travel to the hospital, does not establish what the discussion or arguments between the appellant and the deceased were. It was further submitted that the evidence of Patricia Vira was not clear. She had said that the appellant called her enquiring about an alleged affair of the deceased before the disappearance, as noted in paragraph 17 of the verdict. But when one turns to the evidence it is submitted that under cross-examination and re-examination, she said the appellant in fact called her once only, and that was after the disappearance of the deceased, and it was to enquire whether the deceased had been seen at Paunangisu Village. That witness further said that the story she told the family about the boy assisting the deceased with a telephone was at a time after the appellant had left for the Banks. So, it is submitted the suspicion or inference the appellant had a motive was not established to the criminal standard.

20. The second ground is that the Judge erred in fact an. law by failing to properly consider the evidence taken under oath.

21. First, the appellant addressed the evidence of the deceased and appellant returning to Port Vila. It is submitted that at paragraph 20 of the verdict the primary Judge found that the deceased returned to Port Vila due to the appellant and his family's mistreatment of her. That is to be contrasted with Henry Gabriel's evidence that the appellant and deceased had reconciled and had been living together for two weeks before he went to New Zealand for overseas work in

September 2019. Prosecution witnesses confirmed they saw her speaking with him on the phone before she returned to Port Vila. It is submitted that the deceased travelled back to Port Vila because of the mistreatment by the appellant's family, not the appellant. They submit, based on the record of interview, that the appellant returned to Port Vila from New Zealand because he felt sorry that the mother of his children had been mistreated by his family. It is further submitted that over the Christmas period no-one saw them arguing.

22. Secondly, the appellant continued to call the deceased's family both before and after the discovery of her body. These calls were all enquiring if she had returned home. It was only after the body was discovered that they refused to accept his calls, although the calls were still made. It is submitted that if he had killed the deceased, why would he be enquiring whether she had returned home. It is submitted this casts doubt on the inference that could be drawn. Reliance is made on the case of *Public Prosecutor v James* [2014] VUSC 107, Criminal Case 06 of 2014, where an offender kept texting the deceased's mobile phone even after she had died.

23. Thirdly, it is submitted that the evidence of Henry Gabriel that he shed tears of grief with the appellant when they received news that her body had been discovered were genuine, which casts doubt on the inference drawn. Fourthly, it is submitted that the evidence showed that the deceased was epileptic, and that might be a likely cause of death.

24. Fifthly, the appellant's submission notes that the Judge listed rhetorical questions that he said remained unanswered or needed an explanation. Counsel submitted that through cross-examination and the record of interview that the appellant had given his version of events about his innocence.

25. Sixthly, the appellant refers to paragraph 57 of the verdict and submits there is no circumstantial evidence whatsoever to prove the appellant strangled the deceased. It is further submitted there was no evidence she was committing extramarital affairs, or that the appellant was attempting to have sexual connections with her immediately prior to her death. It is submitted that unless the prosecution proved each of these beyond reasonable doubt from the circumstantial evidence, these assumptions or conclusions were not open to the Judge. The submissions then continue with a detailed review of the evidence and also submissions relating to alternate inferences that could be drawn from the evidence adduced at trial.

26. Seventhly, the appellant submits there were inconsistencies between the witness Patricia Vira's unsworn and sworn statements. In the unsworn statement she said she observed the body in the mortuary and noticed the clothing was the same as her sister's favourites, but that she did not recognise the body because it was decayed and decomposed excepting for the clothes. Yet in her sworn evidence she said she never saw the deceased's body after death. It is submitted that this is a significant inconsistency, and the content of the unsworn statement is very similar to the evidence of her mother.

27. Eighthly, there is reference to the propensity evidence and the appellant accepting he had been violent to his former wife. On this basis it is submitted there were only nine incidents of violence during the marriage, which could mean it was a happy marriage.

28. Next, the appellant referred to the ground that there was a miscarriage of justice, and cited s 221 of the Criminal Procedure Code. It is said there was a miscarriage in the failure to call the bus driver who drove the appellant and the deceased to the hospital; the excluding of Jimmy Tasava's statement in the prosecution disclosure; and the delay in giving unsworn evidence by Ben Vira. We can deal with those shortly now as we do not think anything particularly turns on them.

29. However, the second matter raised an issue of the prosecution blaming its own witness and not the police. We have noted already that when the evidence of Alice Ken was analysed by the Court at paragraph 28, she said she was certain it was 8 January 2020 when she spoke to the deceased, because her brother had travelled to Paama to Vila by ship. The Judge rejected that on the basis that the witness had not given her brother's name to the police to confirm that date. It is submitted that that statement was lodged on 5 January 2020, and it was the police's obligation to speak to Alice again and obtain that information.

30. Submissions were then made that the Judge erred by basing his decision on unsworn statements. The first was the unsworn statement of Claude Wore made on 6 February 2020 to support the date of disappearance of 3 January 2020. It was used by the Judge to compare with the evidence of Alice Ken just referred to. The witness was not called by the prosecution to confirm what he said in his statement, and no application was made to admit it pursuant to s 163(3) of the Criminal Procedure Code. It is submitted that the Court is entitled to draw a *Jones v Dunkel* direction and conclude the evidence would not have supported the prosecution case;[1] *Iririki Holdings Ltd v Trident Holdings Ltd* [2016] VUCA 2; Civil Appeal 15-668 (15 April 2016).

31. The next submission relates to the appellant's record of interview in that the Judge, in paragraphs 36–41 of the verdict, referred to his responses from that interview and drew adverse inferences. The record of interview was tendered in Court without objection, and the appellant exercised his right to remain silent. It is submitted that the record of interview although unsworn was unchallenged.

32. It is submitted the Judge used that unchallenged evidence in the record of interview to analyse the sworn evidence in favour of the prosecution.

33. Finally, it is submitted that in the circumstances of this case the verdict was unsafe and unsatisfactory. It is submitted there is a complete absence of pathological evidence to support the inferences drawn so that the cause of death is not established by the autopsy report or any other evidence. There is reference to the incident report from Sergeant Terry and his findings that the right hand was skinless and had a broken wrist that may have been the result of blunt-force trauma during a struggle when she was alive. And that the right leg was intact, although

1 *Jones v Dunkel* (1959) 101 CLR 298.

fully decomposed. The sergeant also observed a foreign mark on the leg and said it was caused by dragging when the body was still fresh. It is submitted that Sergeant Terry has no medical qualifications and his opinion needed to be set aside by the Judge.

Respondent

34. Essentially the respondent submits that the circumstantial evidence relied on by the Judge to draw the inferences he did were proved beyond reasonable doubt. Further, they say the inferences drawn by the Judge were correct.

35. They framed their written submissions around the necessary elements of the offence, and first submitted that the family identified Alina Vira as the deceased. They further submit that there was sufficient circumstantial evidence to allow the Judge to infer the appellant caused the death. They submit that the reference of Alice Ken and Constable Edmanley Junior referring to 8 January as the date the deceased went missing was wrong, because the appellant never told them that. They submit it is clear that the date she went missing was 3 January, as this is confirmed by the family saying that was the last time, they saw her. They submitted as proof that in early January the deceased and the appellant went to go to the hospital; the appellant returned alone; he went to Alice Ken's home with a packed bag and told her only that he had had an argument with his wife; and after meeting the police on 9 January, he fled to Mota Lava in the afternoon.

36. They also challenged the evidence relating to Jimmy Tasava and the failure to include his statement in disclosure. They say he was called because another witness referred to what he had said. They say it is clear from his evidence that he believed he saw the apparition of a dead person, being the deceased. They submit the fact remains, as accepted by the verdict at paragraph 49, that that evidence did not support any suggestion that the deceased was still alive after 3 January 2020.

37. In relation to the failure to establish a motive relating to an alleged extramarital affair, they submit this was proven. They say this is clear from the unusual behaviour as evidenced by Mr Vira's evidence of what he saw as they went to the bus stop, his being unsettled when he saw the police, going somewhere else to sleep on the night of 3 January and flying out on a different date from what he had told his father in law.

38. It is further submitted that the main theory at trial was the appellant was a violent man with a tendency to beat his partners, and they point to the propensity evidence to support that. They submitted there was some evidence the appellant was angry because he might have heard the deceased was seeing someone on the island, before coming to Port Vila.

39. They submit ground 1 must fail.

40. In relation to ground 2, the respondent submits the evidence referring to the date of return to Port Vila; the continued calls after the deceased went missing; the tears shed by the appellant; and the fact the deceased was an epileptic are minor issues. It was submitted there was no evidence to support the appellant's submission that he returned from New Zealand to support his wife and that they had a normal and happy festive season.

41. As to the second issue, it is submitted the case of *Public Prosecutor v James* relied on by the appellant is quite different because in that case the appellant gave evidence, and the trier of fact had the opportunity to assess and observe the witness and assess whether their evidence was credible. They went further and submitted that it was also possible the appellant was calling because he was not sure whether the deceased was really dead after he had covered her with logs and dirt. They say there are many reasons why the appellant could call, but the evidence was clear that he never assisted the police, and he ran off back to the islands the day after he met with the police. They also submit that the tears he shed with Mr Henry cast no doubt at all on his guilt.

42. It is then submitted that it was agreed the deceased was epileptic, and they say it was not the cause of the deceased's death. But then the respondent accepted it could be a contributing factor. In contradiction this was then submitted to be speculative. It is.

43. They submit that the manner in which the body was found indicated she died from unnatural causes and there would be no need for someone to drag her body and hide it if she had died from natural causes. They point to the injuries to the body that were not consistent with death by natural causes including broken teeth and wrist.

44. In relation to the last part of the appellant's submission, relating to the questions raised by the Judge, they say the Judge was right to raise those questions. They submitted the responses could only be addressed by the appellant at trial and the responses in his record of evidence are not evidence and were never put to any of the witnesses.

45. As to ground 5, we have already said the first three matters raised by the appellant are quite minor and do not assist the appellant.

46. The next submission is that the Court did not reject the evidence of Alice Ken, only that the dates were unclear. It is submitted that none of the issues raised were irregularities that would constitute a fundamental defect in the criminal justice system, so there was no miscarriage of justice.

47. In relation to ground 3, that the decision was based on unsworn statements, and the inconsistency between unsworn statements and sworn statements. The respondent concedes the issues raised in relation to Claude Wore's unsworn statement, but said it had no material effect on the case.

48. The respondent accepted that there was no scientific or forensic evidence as to the cause of death, but they submit that because of where the deceased's body was found, covered with rocks and logs in a secluded area, and that she had broken bones and teeth, it was evidence of foul play. The respondent said whoever covered the body must be familiar with the area and was without doubt the one who killed the deceased. The prosecution referred to paragraph 57 of the verdict and submitted the Judge's conclusions were correct. They also submitted, as we understood it, that the mere fact of the appellant's familiarity with the area, coupled with the deceased being his partner, meant it must have been him that killed her.

49. The respondent submits that the appeal Court should not substitute its own opinion for the trial Judge and referring to *Morrison v Public Prosecutor* [2020] VUCA 29; Criminal Appeal Case 2671 of 2019 (15 May 2020). They submitted that this was a case where a reasonable decision-maker could have entertained no doubt about the appellant's guilt.

Discussion

50. We are satisfied the verdict cannot stand. We will first refer to the general legal principles applicable to this appeal and then refer to the more important parts of the verdict that satisfy us the verdict is unsafe and unsatisfactory. We do not intend to address all of the multitude of matters raised in submissions particularly by the appellant

51. The starting point is s 8 of the Penal Code Act, cap 135:

> **8. General rule as to burden of proof**
>
> (1) No person shall be convicted of any criminal offence unless the prosecution shall prove his guilt according to the law beyond reasonable doubt by means of evidence properly admitted; the determination of proof of guilt beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous.
>
> (2) In determining whether a person has committed a criminal offence, the court shall consider the particular circumstances of the case and shall not be legally bound to infer that he intended or foresaw the natural or probable consequences of his actions.
>
> (3) If the prosecution has not so proved the guilt of the accused, he shall be deemed to be innocent of the charge and shall be acquitted forthwith.

52. However, when a Court uses circumstantial evidence in part or wholly to convict a person, there are conditions that need to be met. Principles are aptly set out in the case cited by the appellant: *Chamberlain v The Queen (№ 2)* [1984] HCA 7, (1983) 153 CLR 521, where Brennan J held at page 599:

The prosecution case rested on circumstantial evidence. Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. First, the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts which the jury finds. The drawing of the inference is not a matter of evidence: it is solely a function of the jury's critical judgment of men and affairs, their experience and their reason. An inference of guilt can safely be drawn if it is based upon primary facts which are found beyond reasonable doubt and if it is the only inference which is reasonably open upon the whole body of primary facts.

53. In *Swanson v Public Prosecutor* [1988] VUCA 9 the Court of Appeal said:

> *"This was a case where the prosecution was based wholly in circumstantial evidence. The Judge correctly acknowledged that the accused could be convicted only if guilt is the only reasonable inference open on the facts. In argument, counsel suggested many suggestions of inferences which, in his submission could have been drawn by the Judge – inferences consistent with innocence. One example of his suggestions will suffice. Counsel suggested that when the appellant asked Mr. Ngwele for the 'Bank Keys' the appellant was only 'big noting'. We regard that as an unlikely inference, far outweighed by the inference of dishonesty.*
>
> *Inferences may be drawn from proved facts if they follow logically from them. If they do not, then the drawing of any conclusion is speculation not proof. Speculation in aid of an accused is no more permissible than speculation in aid of the prosecution. (R. v. Harbour, [1995]1 NZLR 440."*

54. And in *Reg v Van Beelen* (1973) 4 SASR at [379], the Court of Criminal Appeal of South Australia said it is:

> *"... an obvious proposition in logic, that you cannot be satisfied beyond reasonable doubt of the truth of an inference drawn from facts about the existence of which you are in doubt."*

55. Based on these authorities we agree with the requirements that need to be met for a Court to use circumstantial evidence to convict, set out by the appellant at paragraph 19 of their submissions:

a. *First that the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt;*

b. *Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts which the Judge finds;*

c. *Thirdly, inferences may be drawn from proved facts if they follow logically from them;*

d. *Fourthly, if they do not, then the drawing of any conclusion is speculation, not proof. Speculation in aid of an accused is no more permissible than speculation in aid of the prosecution.*

56. We of course also bear in mind the warnings contained in decisions such as *M v The Queen* (1994) 181 CLR 487, (1994) 126 ALR 325, (1994) 69 ALJR 83, where Mason CJ, Deane, Dawson and Toohey JJ state:

> 7. *Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty (13 See Whitehorn v. The Queen (1983) 152 CLR at 686; Chamberlain v. The Queen (No.2) (1984) 153 CLR at 532; Knight v. The Queen (1992) 175 CLR 495 at 504-505, 511) . But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations (14 Chamberlain v. The Queen (No.2) (1984) 153 CLR at 621).*

57. This is confirmed in this jurisdiction by the decision of this Court in *Dovan v Public Prosecutor* [1988] VUCA 7:

> *"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 Counsel's closing speech. The appeal court is not to be regarded simply as an opportunity to have a second bite at the same cherry. When it considers the evidence on appeal, it will always bear in mind that it is deprived of the clear advantage enjoyed by the trial court of having seen and heard the witnesses. That gives the lower court an opportunity to assess the demeanour of the witnesses and to hear the evidence; an advantage that is denied an appellate court bound as it is to a written record that can never be either complete or verbatim."*

58. But it is hardly necessary to repeat that criminal prosecution requires proof beyond reasonable doubt of all of the elements before the Court can convict; and that is a heavy burden.

59. We turn now to consider whether the circumstantial evidence was proved beyond reasonable doubt and whether the inferences drawn by the Judge were the only ones reasonably open on all of the primary facts.

60. There are significant evidential problems that confronted the prosecution and the Judge. The first is there is no evidence as to the cause of death. The second, which may be important, relates to

the date of death. While decomposition was so far advanced it was impossible to establish a cause of death that on its own, if properly investigated, may well have given some indication of the time period when death ensued. It appears no effort was made whatsoever by the investigators to find if this was possible. They proceeded on the assumption that she must have been killed on 3 January, which is reflected in the information. There is also some difficulty with the identification, which was made on the basis of the clothing the deceased was wearing on 3 January and the fact that no other missing persons were reported. It has to be said that the clothing was of a type that is commonly worn by women in Vanuatu. There is a further difficulty that the sister under oath said she had never seen the deceased's body, contrary to what was said in her unsworn statement. In the statement she said decomposition meant she could not identify the deceased apart from her clothes. So, there is only the identification by the mother, also based on clothing, which in our view required a closer analysis by the decider of fact.

61. The next matter relates to a series of rhetorical questions raised by the Judge. It is unnecessary to set them all out in detail, but they can be found in paragraphs 31, 32, 33, 34, 35, and 56 of the verdict. Paragraph 56 is perhaps a combination of the omnibus rhetorical questions posed elsewhere by the Judge. It reads:

> *"56. Why the defendant waited that long before calling his father-in-law is the essential question? And why he went to the town without going straight to the Police to report the incident is another answered question? The defendant waited until 9th January 2020, 6 days later to report and asking for a round table meeting. Why was he crying when he talked with Police Officer Caulton Jnr? And why he left suddenly on 9th January 2020 without telling anyone he was leaving? And why he went to Mota Lava to bring up the 2 children but never did so until his arrest in May 2020, almost 5 months later? These are essential questions that remain unanswered."*

62. So, there is no forensic evidence of the cause or date of death, and the identification required a fuller examination of the evidence.

63. Even that paragraph contains a factual mistake because there is no evidence the appellant was crying when he spoke to police officer Caulton Edmanley Jnr. Rather, the constable described him as being worried and unsettled.

64. One could understand if there was perhaps one or two such comments in the course of a verdict. But here it is a persistent theme throughout the verdict and seems to indicate that the Judge in his own mind had reversed the onus and somehow thought the appellant was obliged to provide the answers to those questions. We are quite satisfied that he could not infer from the failure to answer those questions that the appellant was guilty.

65. The verdict also stated, at 52:

> "52. There was no evidence from the defendant consistent with innocence."

66. This again is consistent with the comment we have already made regarding the apparent reversal of onus.

67. We noted earlier, from *Chamberlain*, that the inference of guilt must be the only inference reasonably open on all of the primary facts which the jury finds. So, it is the cumulative weight of all of the inferences drawn that is critical in establishing guilt. But in considering inferences, there will often be two or more inferences that can be drawn from the same proven facts. Where that occurs, we consider it is incumbent on the fact finder, where he draws an inference that supports guilt, to consider reasonable alternatives and to explain why the inference was drawn. In this case there are a number of situations where there appears to have been other quite reasonable inferences that could be drawn.

68. We do not believe it is necessary to rehearse all of the evidence. Suffice to say there is sufficient evidence to show that the appellant and the deceased got on a bus to travel to the hospital, and only the appellant ultimately returned. We think it somewhat irrelevant as to whether or not they reached the hospital.

69. Noting that the prosecution does not have to establish motive, it was their theory of the case that the appellant was a jealous and violent man who suspected the deceased of having an affair. Although we note that is not established on the evidence, as no-one gave evidence of what the arguments on the critical day were about. But noting that was a possibility, a reasonable inference could well be that she jumped on the blue bus as stated, to leave the appellant.

70. There is no evidence other than the appellant's recorded interview that establishes what occurred after what was said to be a hospital visit. Despite that, at paragraphs 41–43 the Judge rehearses two possible scenarios of what occurred. Paragraph 41 reads:

> *"41. If indeed the defendant and Elina reached Litchee Store, directly opposite the Ecole Ambassade, is the truth, then the defendant's story in his ROI that a Blue Hyundai Bus stopped and picked Elina up is not the truth. One possible scenario is that they bought "Nem" at the Litchee Store and kept, walking up the road. Then having reached the turn off to the Joint Court Hill either they followed that road up and went past Arthur Caulton's residence and followed the bush trail into to the bushes by the TVL towers, or they kept walking down the "dark corner" road to the Tassiriki Round About but took the bush trail up the bushes to the TVL towers."*

71. The difficulty with this scenario is that there is no evidence that both the appellant and the deceased reached the Litchee store. There is only the appellant's record of interview where he said he crossed the road to go to the store then turned back to see the deceased jumping on a blue bus. Nor is there any evidence to support the second scenario which the Judge dismisses but, notwithstanding that, he concludes with paragraph 43:

"43. That left the only scenario remaining is that they took the bush trail to the TVL towers where there are no houses close by. It is a bushy and secluded area. It was here the defendant took the opportunity in light of his suspicions giving rise to arguments that he himself admitted to Alice Simon Ken, the torn t-shirt seen by the Crime-Scene Officer and the broken wrist bone. No other explanations could have been possible."

72. The Judge then refers to a site visit, and concludes the above inferences were drawn as a result of the site visit. The difficulty is the site visit merely records what occurred when the Judge, counsel and others visited the site, so it is difficult to see how inferences could be drawn from that and there is no evidence to support the three alternatives traversed by the judge.

73. At paragraph 53, the Judge finds the circumstantial evidence shows that no person, but the appellant could have been responsible for the death of the deceased. He records the matters relating to the disputed death, and we take no issue with the finding that she went missing from the family on 3 January 2020 but find it difficult on the evidence adduced at trial to find that there is proof she died on 3 January 2020.

74. The evidence accepted by the judge refers the delay in the calling of the father-in-law; the delay in going straight to the police to report the incident; and the fact the appellant left on 9 January, earlier than he told his father-in-law he would be leaving. Again, there are alternate inferences that may be drawn. E.g. there was evidence that a woman told the appellant he should go and care for his children, which is a reasonable proposition. But again, the Judge does not appear to have considered any alternative other than the inference that supported the prosecution case.

75. We are conscious of the inferences that could readily be based on proven evidence. The date of 3 January was when she did not return home and the death was as a result of foul play. We note also that his behaviour appeared odd to others. But as we have just noted for some of that behaviour there was reasonable alternative inferences that should have been weighed.

76. At paragraph 57 the Judge stated:

"57. These circumstances lead the Court to draw one only inference. And that is that the defendant strangled Elina Vira to death on 3rd January 2020. In the course of the strangling, be it over the suspicions of extramarital affairs or in an attempt to have sexual connections, Elina being of epileptic condition might have had fits and died as a result of the struggles. Having found himself in that situation, the only course was to conceal the body in the way it was discovered on 28th January 2020, some 25 days later. The body was decaying and decomposed as witnessed by Arthur Caulton Edmanley and Sgt Berry."

77. There is difficulty with this passage of the verdict. The Judge said the circumstances just referred to above could lead only to the drawing of one inference. The difficulty is the inference drawn is that the appellant strangled the deceased to death. In the absence of evidence of the cause of death, such an inference was simply not available to him. He repeats this in the third sentence

and speculates why this strangling was said to have occurred. Again, there is no evidence to support that and the state of the clothing countered the suggestion of attempted sexual offending. It goes on that the deceased's epileptic condition may have contributed to the death; and once more, there is no evidence to support it.

78. We need to also mention Sgt Berry's evidence. We accept he is an experienced homicide investigator but his expertise does not allow him to give evidence of medical matters for which he was not established as an expert witness. Those matters in his incident report must be set aside. They could have been interpreted by an expert from photos or other evidence but that was not done. In fact he goes even further in his incident report in saying the appellant intentionally killed the deceased. In that he has strayed into the very thing the court was required to determine.

79. We do accept that the evidence of the concealment of the body leads to an inference that foul play occurred and the appellant was familiar with the area, but that falls well short of establishing that the only person who could have caused the death was the appellant. Taking the most favourable view of the proven facts we are not satisfied that leads to only one inference being available.

80. We have not analysed every issue with the verdict, but only the more important ones. Those matters we have identified satisfy us that the verdict is unsafe and unsatisfactory.

81. Accordingly, we quash the verdict.

82. We put to Ms Malites and Mr Karae whether we should order a retrial. Mr Karae maintained a new trial should be ordered. Ms Malites submitted that the evidence could not be improved on, and it fell well short of proving guilt to the requisite standard. We agree with that submission and do not consider that on the critical matters the evidence could be improved sufficiently to establish the necessary elements beyond reasonable doubt.

83. The accused is acquitted.

Dated at Port Vila this 18th day of February 2022

BY THE COURT

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Hon. Chief Justice V. Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU