

Vanuatu - Public Prosecutor v Kilman - Pacific Law Materials

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

CRIMINAL JURISDICTION

CRIMINAL CASE No. 6 OF 1997

PUBLIC PROSECUTOR

-v-

- 1) SAMSON KILMAN
- 2) JOHN TOKOLE
- 3) HANG HANG REUBEN
- 4) NOEL TAMATA
- 5) PETER MOSES
- 6) MANSDEN GARAE
- 7) DANSTAN HURI
- 8) KALMASE PHILIP

Coram: Mr LUNABEK Vincent J., Acting Chief Justice

Counsel: Mr John William Timakata for Public Prosecutor
Messrs Stephen Joel and Reynold Liu for the Defendants

JUDGMENT

I. PRELIMINARY POINTS

1. Choice of language.

This is the judgment of the Court in this case. The proceedings took place in Bislama. The Judgment is written in English and important part of it will be translated in Bislama (if need be) so that the Defendant and all the people who have come to hear the case may be able to know what the Court had decided, and the reasons for its decision.

2. Amendment of Particulars in respect to count 1 of Kidnapping

In his final Written Submission, the Defence submitted that the Defendants do not have the benefit of knowing where the prosecution alleged they have committed the Offence of Kidnapping because no specific place was mentioned in the particulars of the charge of kidnapping although the Prosecution led evidence from the House of the President to the Airport, to Malekula and then back to his House (Vila). The Defence further stressed the point as to whether it is the Court's duty to find out where an offence is committed or that what and where the prosecution alleged an offence to have been committed is true.

They say further that the law in relation to the offence of kidnapping says "by force compel, or by any fraudulent means induce." The law does not read "by force compel and/or, by any fraudulent means induce."

I do agree with these preliminary submissions and I do stress the point that in future, information/charges and their particulars be drafted in English or in French. There is no doubt, the use of Bislama in the drafting of charges create some difficulties. This does not mean that Bislama language cannot be used. It is recommended that when the Prosecutor is not so sure whether the charge and the particulars are correctly stated/written in Bislama language, it would be a matter of practical convenience to draft the charges in English or French and translated to the accused in Bislama if need be.

At this stage of the proceedings, bearing in mind of Section 74 and Section 221 of the Criminal Procedure Code (as amended) Act No. 13 of 1989, it is my view that the Court can direct that the particulars of a Count be amended to include some material particulars as disclosed by the evidence and that the Court decides to deal with this application of the defence as a preliminary issue after the close of the Counsels final speeches and that after that I as the Judge of Law informed both Counsels on the said preliminary point, and with the consent of both Counsels I decided to proceed with an amendment in the particulars as I am satisfied that by doing so, no injustice could have resulted from such a course.

(See For example: *R v. Collson* (1980 72 Cr. App. R. 249, C.A.); *R v. Thomas* (1983) Crim. L.R. 619, C.A.).

In that regard, the particulars of the offence of kidnapping should and is now read as followed:

"Samson Kilman, John Tokole, Hanghang Reuben, Moses Peter, Kalmasei Philip, Dunstan Huri, Masden Garae, yufala i wok olsem ol Vanuatu Mobile Force. Samtaem long namba 12 October 1996

yufala i bin kidnappem President blong Republic blong Vanuatu Jean Marie Leye Lenalcau long State House, oslem yufala ibin fraudulently inducem hem, or compellem hem by force blong mekem hem i folem yufala i go long Bauerfield Airport, Malekula mo kam back long State House, Vila."

3. Nature of Charges

The Accused Samson Kilman, John Tokole, Hang Hang Reuben, Peter Moses, Masden Garae, Dunstan Huri and Kalmasei Philip were committed to this Court charged with the following offences:

In Count 1: That on or about 12 October, 1996, they kidnapped the President of the Republic of Vanuatu, Jean Marie Leye Lenalcau at the State House by fraudulently inducing him or by compelling him by force to follow them to the Bauerfield Airport, Malekula and back to Vila, contrary to Section 105 (b) of the Penal Code Act CAP 135.

In Count 2: That on or about 12 October, 1996 at about 5.30 am they were armed with firearms and assembled together with intent to commit an offence, contrary to Section 69 of the Penal Code Act CAP 135.

The Accused Noel Tamata was committed to this Court charged with the following offence:

In Count 3: That on or about 12 October, 1996, he did aid, Counsel, or procure the kidnapping of the President of the Republic of Vanuatu by some members of the Vanuatu Mobile Force, contrary to Section 30 and 105(b) of the Penal Code Act CAP 135.

4. Pleas

Each and all Defendants pleaded "Not guilty" to all the Counts. These pleas were noted and the trial proceeded on all the Counts.

5. Statement of the Presumption of Innocence was read out to each and all Defendants under Section 81 of the Criminal Procedure Code Act CAP 136 and was explained to them.

II. STANDARD OF PROOF AND ESSENTIAL ELEMENTS OF OFFENCES

This is a criminal jurisdiction in which the Judge is both the Judge of law and the Judge of fact. It is the duty of the Judge to apply the law in full so that the Defendants should know exactly what they have been tried on and so that if the Court has misdirected itself on any points of law, the Defendants would be able to appeal. It is also the duty of the Judge to sum up the evidence, that is, to give

a resume of the facts, again so that the Defendants should know what evidence has been considered by the Court in coming to the verdict eventually.

The function of a Judge as a Judge of fact is to consider the evidence with care and to apply the law as the Court stated it to be, to these facts and eventually to come to the verdict.

This is a criminal trial and as in every criminal trial, it is for the prosecution who brings the charges to prove them. It is for the prosecution to prove each and every allegation of facts in this case. There is no burden on the defence whatsoever. Furthermore, the burden which rests upon the prosecution is a very heavy one. Before I can convict each of the Defendants of any of the charges brought against each and all Defendants, jointly and severally, by the prosecution, I must be sure of his guilt, nothing less will do. That is the same as saying that the prosecution must prove each of the Defendants' guilt beyond reasonable doubt. If the prosecution fails to discharge the very heavy burden that rests upon him on any or all of the counts as against each of the Defendants, to the standard that I have stated, then each of the Defendants as against whom any of those charges have not been proved is entitled to be acquitted. In other words, if at the end of the day I am left with a reasonable doubt as to each of the Defendants' guilt, then each of them be entitled to the benefit of that doubt and to be acquitted.

I bear in mind that the Defendants, Samson Kilman, John Tokole, Hang Hang Reuben, Moses Peter, Kalmasei Philip, Dunstan Huri and Masden Garae are charged jointly upon two (2) counts in this indictment with offences which they can help each other to commit, it is sufficient to support a conviction against any and each of them to prove either that he himself did a physical act which is an essential ingredient of the offences charged or that he helps another Defendant to do such an act, and, that in doing the act or in helping the other Defendant to do it, he himself had the necessary criminal intent.

The direction I have just made is equally applicable to the Defendant Noel Tamata in respect to count 3 in the indictment.

I, therefore, have the duty to look at the evidence upon each of these charges quite separately in order to return quite separate verdicts on each of them as against each of the Defendants. It may be that the prosecution would have proved each of the Defendants' guilt to the required standard upon one or more of the counts, or upon none at all. It does not follow that if each of the Defendants is guilty on one count that he is guilty of all of them, not more than that if each of them is innocent of one count that he is innocent of all. In this indictment, as the Defendants are jointly charged with offences alleged to have been committed by each on the same and not separate occasions, and when they are together, it is not essential for the prosecution to establish that each was acting in concert with the other; it is open to me as the Judge of facts, to each of having committed independently the offences which are the subject matter of the joint charge. This means that where one of the Defendants who are jointly charged with an offence is acquitted, the others may be convicted of that offence as if they had been charged in a separate count with a separate offence.

I bear also in mind that the offence of Kidnapping can be committed in two ways. Section 105 (b) of the Penal Code Act CAP 135 says that the charge of Kidnapping can be made out " by force compel ..." or "by fraudulent means induce ...". In Count 1, the way the particulars of the offence of Kidnapping were drafted contain the two (2) aspects of the charge of Kidnapping. For the sake of simplicity and clarity, I will deal with the charge of Kidnapping "by fraudulently induce ..." as the principal aspect of the charge of Kidnapping in Count 1 and the second aspect of the said charge of Kidnapping "compel by force..." as the alternative component of the same charge of Kidnapping in the same Count 1.

The proper course for me, is to deal with the two aspects of the charge of Kidnapping as if they were - Principal and Alternative counts; I will thus, allow both aspects whether principal or alternative aspects to proceed and be decided ultimately by me as the judge of fact.

Clearly as the judge of fact, I must be satisfied that each ingredient of an offence be proved by the prosecution. If the prosecution fails to establish the principal aspect (Kidnapping by fraudulent means to induce...), the Defendants will be acquitted on this principal aspect of the charge of Kidnapping, and if the prosecution can prove the alternative aspect (Kidnapping by force...), the Defendants would be convicted on that alternative aspect of the charge of kidnapping. But if there is any doubt then I would have no alternative (choice) but to acquit on the second aspect also.

I must also bear in mind that Sandy Moses who is one of the witnesses of the Prosecution, was one of the Defendants during the commission of the alleged offences the Defendants were charged with in this indictment. I think it is proper to warn myself as the Judge of fact that this witness may have some purpose of his own to serve in giving evidence for the Prosecution and that accordingly it would be dangerous to act on his uncorroborated evidence.

The Defendants made no statement in this case. But three (3) of them did, however, elect to give evidence in this case. They did not need to do so. As in any criminal case, there is no evidential burden at all on the Defendants. The fact that three (3) Defendants in this case, have given evidence does not mean that any burden whatsoever is cast upon the Defendants. The Defendants could have remained silent in the dock and simply allowed themselves to be tried on the evidence called by the prosecution as Section 88 of the Criminal Procedure Code Act CAP 136 which was read to the Defendants makes it clear to that effect. In any event, three Defendants gave evidence. This means that having given evidence, the Court must assess their evidence in the same way as any other evidence given in this case by other witnesses. Because they come from the dock, their evidence is not less important in this case than other witnesses'.

In this case, the Defendants: Samson Kilman, John Tokole, Hang Hang Reuben, Moses Peter, Kalmasei Philip, Dunstan Huri and Mansden Garae are charged with:

1 count for kidnapping, contrary to Section 105(b) of the Penal Code Act CAP 135;

1 count for Unlawful Assembly, contrary to Section 69 of the Penal Code Act CAP 135.

The Defendant Noel Tamata is charged with:

1 count for complicity to kidnapping contrary to Section 30 and Section 105(b) of the Penal Code Act CAP 135.

The essential elements of the offence charged in count 1 for kidnapping, the matters which the prosecution must prove beyond reasonable doubt before the Accused can be convicted on that charge, are:

1. The removal of the President from one place to another place;
2. By fraudulent means induce (a) or compel by force (b);
3. Without the consent of the President;
4. Without lawful excuse.

The essential elements of the offence charged in count 2 for Unlawful Assembly, the matters which the Prosecution must prove beyond reasonable doubt before the Accused can be convicted on that charge, are:-

1. The presence of three or more persons;
2. Conduct themselves in such a manner as to cause nearby persons reasonably to fear the persons assembled will commit a breach of the peace;
3. Intent to commit an offence or intent to carry out some common purpose.

The essential elements of the offence charged in count 3 for complicity to kidnapping, the matters which the Prosecution must prove beyond reasonable doubt before the Accused can be convicted on that charge, are:

1. The Accused Noel Tamata did aid, Counsel;
- or
2. He did procure the commission of the offence of kidnapping.

III. ISSUES

The basic facts of the case as it was put by the prosecution were that the Defendants committed the offences charged against them on 12 October 1996. The victim/complainant is the President of the Republic of Vanuatu, His Excellency Jean Marie Leye Lenelcau. The Prosecution alleged that the Defendants by fraudulent means induce or compel by force, the President of the

Republic to go from the State House to the Airport, to Malekula and back to Vila (State House). The word 'force' under Section 105 (b) of the Penal Code Act refers not only to physical force but also to the threat of force and coercion. [*PP v Walter Kota & Others* (1989 - 1994) 2 Van L.R. at 664].

The Defence challenged the truthfulness of all allegations against the Defendants, saying that they do not use force, threat of force and coercion nor any fraudulent means to induce the President. The President of the Republic consented to go with them on Malekula and back to Vila on the said 12 October 1996.

IV- SUMMARY OF EVIDENCE

The evidence in this case has been recorded on tape and the tapes will be the primary record of what was said. What I now do is just give a summary of those parts of the evidence which are important to the decision.

1- SUMMARY OF THE PROSECUTION EVIDENCE

The Prosecution called 10 witnesses.

The First witness was Sangul Barnabe, warden at Port-Vila Central Prison. He gave evidence to the following effect, that on 12 October 1996, he was the security gate officer (security) at the State House. He was the only officer there and he was not armed. On 12 October 1996, at about 5 o'clock am he was surprised to see a truck stopping near the gate of the State House and he saw the VMF Officers with guns and Corporal Samson Kilman requested him to open the gate. He did not know why they were coming. He expected to see the President Body Guards or the Police truck for ordinary check on him. Samson Kilman requested the second time for him to open the gate. They stood now near the gate. He said "*mi look masket nao mi just go openem gate*" (which means I saw the gun and I just opened the gate). He was requested to knock at the President's door. He said he was frightened a little bit because they carried guns and he did not know why they were coming. He said Samson Kilman told two VMF Officers to stay at the gate while Samson Kilman, John Tokole and himself went to the President's House. He said he knocked on the door of the President's house at 5 o'clock am for a little while but the President did not open the door. He said Samson Kilman went to the back of the House and knocked at the window. Immediately then, the President opened the window.

He said Samson Kilman told the President that he wanted to see him very quickly. The President answered "*hemi olraet*" which means "*it is alright*". He then closed the window. He changed (clothes) and opened the door. He then put his shoes and the President, Samson Kilman and Tokole went in front. They went in the truck. He went with them. He said he thought they would go to VMF Camp but the truck went toward Anaburu. He thought they will go to a Minister's house. At the Airport, he saw the security officers who are posted at the Air Club gate were no longer there. They went into the Hangar workshop. He saw Noel Tamata opened the right side door for the President and they both went into a small office room. Less than 10 minutes later they both came out of

the room and got into the plane. Tamata did shout from one side and the other for the VMF men to board the plane. He said he identified Samson Kilman, John Tokole, Kalmase Philip and Hang Hang Reuben who came to take the President.

Under cross-examination, he said he was the only security officer at the gate of the President's House. He said they worked without arms. They are not allowed to take and use arms. When he was asked about his statement, he said his statement is alright but he admitted he got mixed up with the names of the Accused. He was then asked:

Q.: "you stap close up taem we Samson Kilman i tok tok wetem President?"

A.: Taem President i putum shoes finis hemi talem:

"Mi ting se ol man ia oli fixim problem blong yufala finis - Mi sek hemi stap long Tahiti finis. Be hemi oraet - yumi go."

He was further asked:

Q.: "You luk Samson wetem Tokole oli pushum President or toktok strong long hem?"

A.: "No. Samson i talem nomo se hemi wantem lukim hem quick time."

Q.: "Yu tokabaot masket. I gat any long tufala i poetem President wetem masket?"

A.: No.

The next witness is the President of the Republic of Vanuatu, Jean Marie L  y   Lenalcau.

In his evidence, witness/President Jean Marie L  y   Lenalcau testified to the effect that in the early morning of 12 October 1996 at about 5-15 or 5.30 am, he was in his room. Someone knocked on the window. He said he looked through the timber window space, he recognised Sato's brother. At that time, he did not know his name. He has some difficulty in identifying Samson Kilman in Court but said he does not know much about Sato's brother but he was the one who drove the truck when they left the State House. Sato's brother told him to come outside and he will go with them at the Barracks (VMF). The witness then replied: *"Wait mi change."* He then opened the door, come outside and asked about his security officers. He was then told, they will look after his security. He said when he came outside he saw another VMF officer behind Sato's brother. He did not recognise him because he was dressed in VMF uniform, he painted his face and he had a gun. At that time he said he had no plan for that day because he was just woken up that morning. He was then asked:-

Q.: "Sipos you no gat any plan long day ia, from wanem nao you follem Samson?"

A.: From we hemi talem long mi se you come yumi go long Barracks. Aley, long side blong security blong mi, mi askem se wuhem ol security blong mi? Oli se you no worry, mifala istap wetem you yumi go. Mo taem we yu karem masket yu stanap long face blong mi, hemia you forcem mi ia...

Taem ia mi save, from mi gat 64 years ia. Taem you karem masket, yu stanap long face blong man, you paintem you long ol colour, mo yu putum ol uniform blong army - never mind you no forcem mi mo hollem mi, sakem mi outside, but wetem masket mi fraet from laef blong mi."

Before they went to the truck he saw outside, near the State Nakamal, the place where the President receives his official guests, a VMF officer in uniform, carrying a gun and with painted face and he saw 2 other VMF officers near the truck. He got into the truck next to the driver. When they left, he thought they were going to the VMF Camps because he was told earlier that he should not be worried, they were going to the camp when he asked about his Security Officers. Inside the truck, he saw that the road leading to VMF camp was left aside, he then asked to Sato's brother who drove the vehicle:

Q.: "Be yumi go where ia?" He replied:

A.: "No yumi go long Airport."

The witness testified that he did not know why they were going to the Airport. But Samson Kilman himself told him the following:-

"Bambae yumi go long Airport, yumi go long Malekula, yumi tekem Barak Sope i kam back long Vila."

At the Airport, he saw so many of the VMF Officers there. He did recognised one of them, Tamata. Tamata talked to him. He did not row to him. He is related to the witness. He said Tamata told him words to the following effect:-

"Bae mi telephone i go long one uncle blong mi, pikinini blong hem Wyclif blong hemi talem aot long olfala woman se hemi no worry. Yumi go nomo yumi kam bak."

He then said Tamata telephoned in a room situated at the workshop, the place where tools of the plane were located. It was early in the morning. No workers or civilians at that early morning yet. The fuel of the plane was not yet refilled but by force only the plane has to take off.

He was then asked:-

Q.: "Why you talem se by force nomo plane i must tek off?"

A.: "Olgeta Mobile oli no rao long Sumsum blong hemi tek off. But taem yu karem masket yu stanap long face blong man, wuhem road blong man ia we masket istap long back blong hem? Hemi mas follem order blong yu we masket istap long hand blong yu."

Inside the plane, he said he was talking to Tamata and he confirmed that they will go to Malekula to get Barak Sope back to Vila. He said he then knew why they were going to Malekula and why they will bring Barak Sope back to Vila.

At the Norsup Airport, nobody was there. No truck. A vehicle was stopped. The driver was with a passenger. The passenger got out with his belongings the driver drove the vehicle with the witness and some of the members of the VMF officers to Lakatoro where Barak Sope, the then Deputy Prime Minister was with his delegations. At Lakatoro, the witness said the VMF officers got moved around the House while himself, Tamata and Barak Sope were in. He testified further that Barak Sope asked:

Q.: "Wanem ia?" The witness said:

A.: "Mi laugh nao mi se mifala i kam from you ia."

Q.: "Why?" The witness replied:

A.: "Mi no save hemi problem blong yufala Government. Oli tekem mi blong mi toktok wetem yu. Yu must go back long Vila."

The witness said, the Minister then asked Tamata:

Q.: "You no ting se move we yufala i mekem i big wan tumas blong tekem President blong State i kam long place ia?" Tamata then said:

A.: "Yes. But nowia yumi mas go back."

The witness said, Sato Kilman arrived and asked him:

Q.: "How you kam?" He answered:

A.: "Mi stap sleep yet nao oli talem se mi kam tekem big man blong yumi i go back long Vila."

The President gave evidence that Minister Sope accepted to come back to Vila but under the condition that he will come through a normal flight. But the President said:-

Q.: "Oli removum mi from problem blong Government. Nowia yu mas kam wetem mi long same plane yumi go back long Vila."
Barak Sope then accepted.

The witness further testified that on the flight back to Vila, there were lots of

discussions. Tamata got information through the Pilot about the situation of the Port-Vila Airport. He said he remained quiet. The Member of Parliament Sato Kilman talked to pilot then informed the plane passengers that the plane will land at the end of the Airport towards Mele. Before the plane landed, Barak Sope told the witness:

"Leye" the President answered: "Yes"

Barak Sope then said:

"Nowia i gat fulap man. Yumi no save wanem bambae i happen. Taem yumi go down, sipos yu harem se masket i fire-up yu sleep down."

The President then said:

"Wanem World War II back again ia."

After the plane landed, he was taken back to the State House by his security officers.

Under cross-examination, the President/witness identified Samson Kilman as Sato's brother. He confirmed that before the incident of 12 October 1996, he heard about the problem of the payment of VMF allowances. But he pointed out that this is not his business. It is their business with the Government.

When he was asked:

Q.: "Taem yu lookim brother blong Sato long early morning ia, yu ting about se may be hemi somthing to do wetem problem blong ol VMF?"

He then said:

A.: "No. Hemia mi no bin save nating. Mi no bin save se bae i gat wan plan i Oslam ia blong oli mas tekem mi blong go tekem Barak i kam back blong solvem problem blong olgeta VMF."

He said this is the first time someone comes to the President house, knocked when he is still in bed. He said if Samson was coming alone, he would not be surprised because he knew that he came to see him for something. But he got surprised because behind him, another VMF officer stood up and carried with him a gun.

He was asked:

Q.: "Man we i security guard long State House long night ia Mo client blong mi oli talem se i bin gat small toktok before yufala i move go long truck." He replied:

A.: "Hemia nao taem mi askem se 'yumi go where?' oli talem se yumi go long camp mo mi askem 'where security blong mi'- oli se yu no worry mifala i tekem security blong yu."

The President said he said good morning to Samson Kilman.

He was then asked:

Q.: "You no bin sakem any toktok olsem se problem blong yufala i solve finis or nogat?"

A.: "Taem we olgeta i talem long mi se yumi go long camp - taem ia nao mi save - mi askem se wanem problem yumi go from- be himia long truck. Nao mi talem se mi ting se problem ia i solve finis. But ino long door. Taem mifala i stap ron i go long Airport taem oli talem long mi se mifala i go from Barak."

He did confirm he talked to the Prime Minister to solve the issue of the VMF. He denied having talked about that with Samson Kilman. But he said he talked to Tamata and suggested that if the Prime Minister returned he would talk to him to help the settlement of the VMF problem.

He was then cross-examined about his statement and the event of 12 October 1996. He then said what he said was what he saw and he could not forget them. He did then confirm what he said in his examination in chief.

He was then asked when he remembered he talked to Samson Kilman about the departure of the Prime Minister to go overseas.

He then answered:

A.: "About Prime Minister we hemi leavim country, hemia nao mi talem finis. Taem mifala i kam back finis mi mi singaot Tamata and same time too same tingting we mi mi gat Barak Sope too i sendem toktok i kam blong meetim mi blong mitufala i drink kava. Long place ia nao, taem we mifala i meet togeta long afternoon lon em, mifla i stap toktok nao, mi talem long Tamata se sipos olsem wanem sipos P.M. i kam back bae mi traem toktok wetem hem blong hemi save faenem wan solution blong solvem problem we istap between yufala nowia wetem Government. From we mi ia mi gat nating long hemia. Toktok ia mi talem taem mifala i kam back finis. Mi signaotem olgeta i kam mifala i dring kava long House."

He confirmed again that when he was woken up from his bed, he did not know about the plan. No one told him about that. It was only when they were in the vehicle on their way to the Airport that Sato's brother told him that they were going to Malekula to get Barak Sope back to Vila to solve their problem with the Government.

He confirmed, they told him to go to VMF camp. He did not ask them. He said

he followed them because they had gun behind him. He gave evidence also that this is his third year as President of the Republic of Vanuatu. The following questions were put to him:

Q.: "Long taem yu stap olsem President, i gat fulap taem we ol VMF Officers oli karem masket taem you inspectem guard of honour?"

A.: "Taem we mi inspectem guard of honour long ol Mobile, hemia olgeta Mobile oli givim respect long 1 bigman we oli save. But style ia we uniform blong Mobile, paintem ol face i colour colour blong you no look save hem mo masket i no olsem be masket i olsem (gun held in front) hemi different story ia."

Q.: "Long taem ia long early morning long 12 October, i bin gat 1 time we anyone i pointem masket long yu se yu go...?"

A.: "No, never man i pointem masket long mi se mi go. No."

Q.: "So i nogat man i pointem masket long yu se yu go. Yu nomo yu lookim masket nao yu feel se yu mas go?"

A.: "Taem man i karem masket i kam long doa blong House we mi sleep long hem, alley i talem long mi se mi go, hemia masket i forcem mi blong go. Hemia i different long hemia we man i karem masket i stanap long gate i givim honour taem yu pass blong go insaed long truck. From mi no need blong go insaed long truck but mi mas go."

Q.: So masket, oli no bin threatenem yu wetem masket, yu nomo i formem up tingting ia?"

A.: "Mi no formem tingting ia but masket hemi kam. Taem oli showem masket long mi - i mean se mi mas go inside long truck and even oli missim one (1) bullet blong masket ia i full down, mi mi hollem. No gat report blong hem."

Q.: Yu bin aware se ol securiti guard blong yu oli karem masket long olgeta?"

A.: Yes.

Q.: Hemi no mekem any difference long opinion blong yu long wanem we hemi happen lon 12 October 1996 long morning?"

A.: "Mi no save long luk luk blong yufala. Blong mi i gat 2 kind fashion blong holem masket long face blong man. One (1) hemia mi fraet long hem: Uniform blon war, paintem face blong yu wetem ol kind colour, hangem basket we i stap behind long yu, masket i facem yu. Hemi i different long hemia we hemi normal

wan ia."

Q.: "Sir long morning ol VMF oli no putum back long shoulders blong olgeta ia, no?"

A.: "Mi luk samfala oli karem back blong olgeta. Be mi no save talem sipos everywan."

Q.: "Samson Kilman i bin talem long yu se yu no worry about security blong yu, olgeta oli lukaotem yu?"

A.: "Yes. Hemi talem taem mi askem hem about security guard blong mi. So taem hemi talem olsem, mi go inside after mi kam back outside."

Q.: "And ino from hemia you follem olgeta? Olsem yu harem se hemi easy lelebet blong follem olgeta?"

A.: "And mi nao mi askem se, be sipos mi refuse?"

Q.: "Long taem ia yu bin talem se yu refuse?"

A.: "No mi no talem long olgeta from i gat one someting i stap. Sipos mi refuse - bae mi stanap here today or no?"

Q.: "Taem oli kam knock long door blong yu, yu bin talem fastaem se yu lukluk tru long wan whole yu lukim olgeta outside, yu lukim how many people long taem ia?"

A.: "Mi luk tufala two (2). Mi luk hem mo narawan istap behing long hem. Mi luk ol mark. Taem ia mi come out nao - mi sek mi se where security blong mi? But taem oli talem olsem ia, ino gat one road more mi follem. Mi mas go follem toktok blong olgeta from life blong mi ia."

Q.: "Taem Samson i talem long yu se bambae yufala go long Malekula mo tekem Barak Sope i kam back long Vila, yu no talem long hem se yu no save go?"

A.: "No mi no save talem se mi no save go from olgeta behind oli holem masket i stap. So mi gat no way blong go. Mi mas obey nomo."

Q.: "Long Airport, yu no bin talem long Noel Tamata se yu no save go?"

A.: "No. Mi no talem long hem mi no save go. Mi bin talem finish. Sipos mi bin refuse?"

Q.: "Hemi 1 assurance blong you se some VMF officer oli callem

House blong yu se olgeta long house oli no worry se yufala i go mo come back?"

A.: Taem we hemi talem long mi olsem, mi mi worry nomo long olfala woman but assurance blong mi olsem President Leye, ino wife blong hem, assurance blong mi ino gat.

Q: Hemi no true blong puttum olsem se yu nomo yu assume se oli takem yu igo long Barraks. Olgeta oli no talem yu?

A: Mi no askem olgeta se yufala i takem mi go long Barraks, or mi no talem long olgeta se long 5.30 am yufala i kam wokem up mi, oli just kam long tingting blong olgeta nomo.... Olgeta nao oli kam from mi, wetem masket, masket i askem but sipos oli bin askem without masket, mi wait long security blong mi. But taem i gat masket behind, mi mas go."

The President confirmed in his evidence that on Malekula, they had some tea and in the evening of 12 October 1996, he invited Tamata, and two other VMF officers to drink kava. He said Barak Sope had the same idea and joined with them to drink kava that evening.

He explained to Noel Tamata before they drunk kava that he invited them in his Nakamal (Nasara) to drink kava to clear their face. It is part of the custom. The law is different.

He was asked:-

Q: "You feel no streight taem yu kam back from Malekula yu no lodgem complaint long police?"

A: Hemia nao statement we yu stap readim long Court. Hemia long side blong law ia. But kava hemi long side long custom.

Q: Olsem President blong Republic, taem Samson i talem long yu blong go long Malekula mo Tamata i talem yu blong go wetem olgeta blong takem Deputy Prime Minister yu fil se yu gat moral duty blong assistem olgeta. Provided ino gat any breach blong law?"

A: Sipos oli talem long mi se mi go and sipos mi olsem Head of State mi talem se mi refuse blong go, mi no gat wan security blong mi we istap wetem mi, mi wan nomo ia and sipos mi refuse, where nao secutity blong mi".

The next witnesses are Sam Teddy, Sokovman Wotlolan, Rolland Malesu all are security officers attached with the Head of State. They gave evidence to the effect that none of the President security officers knew about any tour planned for the President to go on Malekula on the 12 October 1996. Sam Teddy testified that he is the Security Manager for the Head of State. The purpose of

his duty is to know where the Head of State is going from point A to point B. Security Officers should and must know about these Tourings and the exact places. The 3 of the President Security Officers gave evidence about the attempt they did to locate the whereabouts of the plane in which the President was in. They gave evidence that they telephoned to Santo and Malekula. Security officer Sokovman said just before the plane landed at the end of the Airport next to Mele, Samson Kilman told him to go there and he said he saw Samson Kilman posted some of the VMF officers to cover up the area. He said he saw the VMF officers were aggressive through the combat way. When he was cross-examined, he said Mrs Lenelcau did not mention about any telephone call from the airport. She was just crying and said the President was taken away by the VMF officers. He confirmed the VMF were in full uniform, with painted faces except Noel Tamata and they carried guns. He reconfirmed Peter Moses, Noel Tamata and in Court he showed one of the accused who is Masden Garae.

He was afraid of them. (He was 5 metres from them), they were in rear side that is they were ready to any action. He said he saw one of the defendants in a rear side position inside the plane. Witness Rolland Malesu said after he arrived at the State House, the first thing they found was a bullet. He took it to the President's Home. When he was crossed-examined about the bullet, he said he did not know where the bullet came from and no report was made to find out. He gave also evidence that after the plane landed on 12 October 1996, before they took the President and drove him back to the State House, he said he knew Noel Tamata. He said Noel Tamata requested that the witness himself with his friend must go out from the car, they both were in. He said he made that request seriously with strong words.

The next witnesses for the Prosecution was Judas Silas, a police officer from the criminal investigation section of the Police Department. He testified he was at the airport, when the plane landed. He saw the President, the Deputy Prime Minister Barak Sope, Member of Parliament Sato Kilman, Noel Tamata, Peter Moses, Sandy Moses and Danstan Huri. They were dressed with full army uniform, painted face and they carried guns.

The next witness of the Prosecution are: Livo Lui, Andre Lauto and Christopher Renolds. They are security officers attached with the office of the Deputy Prime Minister. Livo Lui gave evidence that he saw through the window of the house the VMF officers with uniforms, heavy backs (wrappings) carrying guns. He said Noel Tamata was the Leader of the group of the VMF officers at that time. Andre Lauto testified, the VMF members at that time took position around the House while the President, Noel Tamata and the then Deputy Prime Minister Barak Sope were in. He said Noel Tamata told them words to the following effect:-

*"Something we mifafa i askem oli no wantem. Mifala i carem
President i kam, yumi makem long wan peaceful way nomo."*

Christopher Ranoylds said that after the VMF officers came back to Vila with the President and the then Deputy Prime Minister Noel Tamata called upon Security Officers of the Deputy Prime Minister whether or not they supported

the move they have taken and he testified that Noel Tamata told them that he is now their boss.

The last witness for the Prosecution was Sandy Moses. He was one of the Defendants. He said he was with his friends who took the President in the plane. He identified himself, Major Noel Tamata, Moses Peter, Philip Kalmasei, Danstan Hurry, Masden Garae, Captain Ron Sumsum and the President. He confirmed, they were dressed with full uniform, and they carried guns and Noel Tamata led the group while on Malekula.

Under cross-examination, he said he was a member of the Stand-down group, the decision was made by groups but in the case of going to Malekula with the President to take the Deputy Prime Minister, back to Vila, he was not aware of it. That is the end of the Prosecution case.

Section 88 of the Criminal Procedure Code Act CAP 136 was read and explained to the Defendants.

2- SUMMARY OF THE DEFENCE EVIDENCE

The Defence called three of the accused to give evidence.

The First witness of the Defence is Samson Kilman, a Corporal Rank within VMF. He gave evidence to the effect that a standdown group was set up in April 1996 because their superiors and the Government did not pay their outstanding allowances. They decided to stop doing training exercise and claimed for the payment of their outstanding allowances. Their claims were made firstly through the commander of VMF and the VMF financial officer. They gave no positive response. They were requested by the member of Stand-down groups to resign. (see Exhibit D1). The accused wrote to the Police Commissioner about their claims. He did not give a positive response either. They wrote to the Minister of Home Affairs, responsible for the Police, (see Exh. D3). No response was given to the accused letter. There was then a change of the Government and a new Minister for Home Affairs and Police was appointed. (Hon. Robert Karie) who accepted to arrange for the settlement of the accused's outstanding allowances. On 10 October 1996 the Defendants and the Government reached an agreement whereby, the Government agreed to pay the Defendants' outstanding allowances. The agreement was to be signed on 11 October 1996 by the Representative of the Stand-down group and the Honourable Prime Minister, Serge Vohor, early morning at 6 o'clock am before the Prime Minister left for Overseas Trip. The Prime Minister left on 11 October. The agreement was not signed. The Defendants stayed, nothing happened and in the early morning on 12 October 1996, Samson Kilman, John Tokole and Hang Hang Reuben went to the President's House.

The witness said, he went to the President's House in order to request him as the President of the Republic to find a solution to solve the problem of their allowances. He went there at 5.30 am because it was less disturbing for Vanair scheduled flights. When he arrived at the State House, he came out of the vehicle he drove and went to the gate of the State House. He saw a security at

about 3 metres from the gate. He said good morning to the security and he said good morning to him (Samson). He asked the security:

Q: "Olfala i stap?"

A: "Yes olfala istap"

Q: "Yu save openem gate. Mi wantem toktok wetem President. Sentry istap luk luk mi, after mi askem again second time, Yu save openem gate mi wantem toktok wetem president."

The sentry was Barnabe. He opened the gate. Samson went to the President's yard. He told the Sentry to knock at the President's door. John Tokole went with him at the President's house.

Q: "Then"

A: "Sangul hemi knock knock longtaem lelbet no gat man i openem door. Mi wokabaot mi go long window mi knock. Mi lukim window hemi open. I gat light inside long Room mi look President istap wetem wife. Mi askem president se:-

"mi save toktok wetem yu? Mo President reply se: "OK. Yu go wait long door" Mi go wait long door. Mo President i openem door blong hem. Mi salute long Hem mo mi talem "Good morning Sir". Mo Hem too i talem "Good morning". Mo mitufala i shake hands."

The witness further said that after they shook hands, the President asked him:-

Q: "Olsem wantem long problem blong yufala. government i paem finis or not yet." He answered:

A: "Not yet sir " and he said the President told him:

"Man Serge Vohor ia, mi singaotem two(2) times i kam long place ia now yu stanap ia, mo mi talem long hem say yufala i mas pem wanem we ol pikinini blong yumi oli stap askem. Forom olgeta now oli security blong country ia. Be nowia mi hearem se hemi stap long Tahiti finish."

The witness Samson said he replied:

"No Sir mi ting se ino long Tahiti be long Mauritius" And the President then asked:

"Olsem wanem, yufala i wantem wan samting." The witness replied:-

"Sir mifala i kam askem sipos yu save kam wetem mifala bae yumi go long Airport, bambae yu lukim wan boss blong mifala long

airport, bae boss blong mifala i toktok wetem yu finis bae yumi go long Malekula lukim Barak Sope long Malekula i kam long Vila blong mekem mifala i stretem problem blong mifala we istap naoia." the President said "olright bae yumi go, mi go change mi kam ok yumi go".

After 5 minutes waiting, the President came and said "alright bae yumi go nao". the President came outside with a pair of shoes, after he put and fixed his shoes he said, "olright yumi go nao... olsem wanem long ol body guard blong me" He told the President: "Sir bae mifala i lukaotem yu".

He said he and Tokole did wear Uniform. He did not have guns , Tokole did carry a gun with him. He denied he had painted face. He said he told Mrs Leye Lenalgau not to worry. They take the President with them and they will take him back home.

He said he saw Tokole hold his gun at the back. He said the President could see Tokole because he was just close to him. He said there were three(3) VMF officers sitting at the back of the vehicle. He mentioned Hang Hang Reuben and 2 others. He said when he talked to the President, no VMF officers inside the vehicle. They were inside the President's yard. They salute the President. He then said, when I talked to the President none of the VMF officers was around.

They went to the Airport, on their way to the airport, the President referred to the allowances and said I have already spoken to Serge Vohor about it but I think we will settle them now. At the airport, Tamata opened the door to the President, saluted him and they went into a Room. Tamata asked the President: "Do you know why you came here. The President said yes Samson told me at the State House."

He said Major Noel Tamata told him to phone VMF Camp to pass on an information to Wycliff Tahi that the President is alright. We will take him back. When the President and Major Tamata boarded the plane, he returned to the VMF Camp.

He further testified that after the plane landed, he saw the President, Major Noel Tamata, Moses Peter, Philip Kalmasei, Sandy Moses, Danstan Hurry, Masden Garae, the then Deputy Prime Minister Barak Sope, MP Sato Kilman, and the two security officers of the Prime Minister's Office Livo and Lauto.

He testified also that on that day they signed an agreement with the Government (see Exhibit D4). He finally testified that in the evening he and Tamata were invited by the President to drink kava with the President and the Deputy Prime Minister Barak Sope.

Under cross-examination, the witness said they felt bad because their allowances have not been paid. They follow every proper channel unsuccessful. When he was questioned about some of the previous statement he made to public, he said whatever was reported in the news paper was not normally the

truth of what he actually says. He denied he could take law into his own hands.

When he was re-examined, he said it was the groups decision for them to be armed. He said they took the President in order to ask him if he could come with them. They provide the President's security.

The second witness of the Defence was John Tokole. In general, the testimony of this witness confirms the testimony of Samson Kilman. He did confirm that he and other VMF officers had guns but Samson Kilman had no gun. All wear uniforms but they did not paint their face. At the Airport, he confirmed Tamata opened the door for President to go out from the vehicle and also to board the plane to Malekula. Then he testified also about the signing agreement between the Government and the Stand-down group.

Under cross-examination, he said when the President came outside, he held his gun at his back.

The last witness for the Defence was Hang Hang Reuben. He said he and two (2) other VMF officers were staying at the President gate. Samson, Tokole and Banabe went to the President's House. He said they waited about 20 minutes and when the President arrived with Samson, they saluted him. He said good morning to the President and the President said good morning to him. Then Samson Kilman drove the vehicle to Airport. At the Airport, he saw Tamata opened the vehicle door for the President, saluted the President He saw the President and Tamata went into a small room. Then they came out and went to board the plane.

Under cross-examination, he was asked:-

Q: Taem yufala i putum stand-down group yufala inomo follem order blong VMF Commander?

A: Yes

Q: So long taem ia spoksmen blong Stand-down group hemi Samson Kilman?

A: Yes

Q: Major Noel Tamata hemi 1 Boss blong yufala long taem ia?

A: No - No.

Q: Long morning blong 12 October 1996, yu bin carrem 1 arm?

A: Yes

Q: Order blong carem arm ino come long Order blong VMF Commander, hemi true?

A: Yes

Q: Taem yufala igo long State House; Sentry long gate i no gat arm, i true?

A: Yes

Q: Why yufala i takem President i go long Airport, blong look specifically Major Noel Tamata?

A: Hemi wan officer we hemi close related wetem President mo hemi family wetem President.

He finally testified that they had an operation by the name of Thunderbold. That is the end of the witness evidence and the end of the Defence's case ended.

V. LEGAL ISSUES

The fundamental question of law raised in this case is whether to constitute the offence of kidnapping, it is necessary for the consent of the President/victim of kidnapping to be vitiated by force, the fear of force, or fraud;

or whether it is sufficient to prove that in fact the complainant did not consent.

VI. FINDINGS ON FACTUAL ISSUES

1. The charge of Kidnapping

A. The Defence submission on the charge of kidnapping

(1). Was Force used?

In relation to the essential elements of the offence of kidnapping, the Defence submitted the following:-

There is no evidence whatsoever that the President was ordered in anyway, or that guns were pointed at him in an aggressive and/or threatening manner. Prosecution seeks to rely on coercion which literally means to compel or to restrain by force or to place oneself in authority without regard to individual wishes or desires.

The President alleges that when you have a gun and a painted face in front of you, to him that amounts to force.

The defence submits that the President's view does not amount to force within the scope of what is required by the element of force in kidnapping charge.

In the case of *Public Prosecutor -v- Walter Kota and others* reprinted in Vol. 2 of the Vanuatu Law Reports at Pg. 661, there was an order by the Chiefs which

the defendants have done everything necessary to ensure the Complainant followed even though no physical force was used.

In this case there was no physical force, neither was there any order requiring the President to go away. There could not have been any coercion.

Evidence by the Defendant showed there was an uppermost respect by the use of the word Sir, by not coming earlier than necessary, by Saluting him, by having with them arms to symbolise his status and authority.

There is no evidence apart from that the President himself claimed it to be. There is no corroboration whatsoever, not even from the Security Sangul Banabe. The Defence submits there are clear doubts which are reasonable this elements of force is not proven as the standard requires.

(2). Was fraudulent means used to induce?

The evidence led by Prosecution in regard to this element was that the President was told by Samson when he opened the window that Sato Kilman's brother told him "You come we will go to the Barracks".

The other evidence from Banabe Sangul was that he thought they were first going to the VMF Camp, then they drove passed, he thought they were going to see a Minister.

The President was told they were going to the airport after they had driven passed the road to the VMF Camp.

This evidence is therefore produced without any corroboration whatsoever.

The security testified as to the fact that the President was requested to be spoken to through a window to which the President replied "Ol raet". There was no mention of a trip to the Barracks then.

The security also told the Court about the President's conversation with Samson Kilman outside the house which was repeated by Samson Kilman and Tokole in their testimony.

Samson Kilman testified he told the President they were going to the airport to see a boss and then they will go to Malekula and return with the Deputy Prime Minister Barak Sope.

To which the President said he will go and change his clothes and before they left the house he asked for his body guard and Samson assured him they will look after him without going into the details already covered.

This testimony was corroborated by the evidence of John Tokole and to a certain extent the Prosecution evidence of the security Sangul Banabe.

The defence submits the court will have a reasonable doubt as to whether or not

there is a real Fraudulent inducement of President Jean Marie Leye Lenelcau.

(3). The common Law Consent in R v D (1984) 2 ALL ER 499 At 453

The Prosecution case is that President has not tried to find out what will happen if he refused to go. Prosecution led no evidence of a refusal to consent to go. The President is the symbol of Unity and guardian of the Constitution. It would be unbelievable, they submit, that he did not enquire and refuse to go with the Defendants.

That any consent to go was adduced fraudulently making him believing he was going to the camp whereas he was not.

This leads to the problems highlighted earlier in regards to the wording of the Law which seems to suggest either a complainant is forced or induced. It seems difficult to contemplate a person being forced and induced at the same time.

Prosecution evidence from Sangul Banabe are that the President agreed by the word "*ol raet*" whether or not it is adduced is not clear but two defence witnesses Samson Kilman and Tokole John gave consistent accounts of a conversation in which he was told about their trip after which he changed his cloths and said "Oltraet, yumi go" and then they went.

The Defence again submits that the Court can either find that the President consented or that there would be so much serious doubts that the Court cannot be satisfied that a consent was not given.

B. The Prosecution submission in respect to the charge of Kidnapping

In respect of the charge of Kidnapping against the above named defendants, it is submitted for the Prosecution that the defendants did Kidnap the President of the Republic of Vanuatu, His Excellency Jean Marie Leye Lenelcau Matawai in the early hours of the morning of the 12 October 1996.

It is submitted that the **essential ingredients** that the Prosecutions must prove beyond a reasonable doubt are:-

1. force that compels or fraudulent inducement
2. causing a person to be taken from any place to another

In order to prove that "force" was used to compel, the President to go from his residence to a waiting hilux and further to the airport, the Prosecution relies on the case of *Public Prosecutor -v- Walter Kota & Others* (1989 - 1994) 2 Van L.R. at 664. In that particular case his Lordship Justice Downing states:

"The use of the word 'force' in section 105 (b) in my view clearly refers not only to physical force, but coercion and the threats of force."

The Prosecution submits that in the case presently before the Court, coercion and the threats of force caused the President of the Republic to go from his residence to the airport. The Prosecution further submits that the fact and evidence in this case clearly comes within the ambit of coercion and the threats of force.

The Black's Law Dictionary, 6th Edition 1992, West Publishing Company, United States of America defines Coercion as:

"Compulsion, compelling by force or arms or threat. It may be actual, direct, or positive, as where physical force is used to compel act against one's will, as where one party is constrained by subjugation to other to do what his free will would refuse."

The Barrons Law Dictionary, copy right 1984 defines coercion as:

"Any form of compulsion which compels a person to act other wise than freely. It is more often used to describe any pressure which is brought to bear on another's free will."

The Webster's Encyclopaedic Unabridged Dictionary of the English Language, Portland House. New York, copy right 1989, defines coercion as:

"Exercise of force to obtain compliance. Force or the power to use force in gaining compliance."

It is also put for the Prosecution, that the President of the Republic in giving his evidence said, "I see masket, soldier paint face, full army close, mi fraet to mas so mi mas go". Further in cross-examination when asked by the defence counsel, 'what do you say to the fact that no guns were pointed at you, you saw the guns and decided to go'. The President in reply to this stated, "Mi luk masket mi go, masket point, mi mas go, emia laef blong mi, mi mas go ". The prosecution says, this is clear evidence of the fact that the President was coerced and further evidence that there existed an imminent threat of force.

At all relevant times the defendants were armed, except Samson Kilman. The prosecution says, this is a fact not disputed by the Defence. The defence witness Hanghang Ruben in his cross-examination admits to the fact that no orders from the Commander of the VMF were given, further, it was upon their own motion to arm themselves and carry out an operation which they named 'Thunderbolt'. The evidence for the Defence was consistent with that following of the Prosecutions in regards to entering the State Residences at 5.30 am. The Prosecution witness, Sangul Barnabe in his evidence said, that he was the sentry on guard at the State House when the defendants drove up to the gates which he had locked. At that time he was unarmed and alone. He says that he saw the defendants armed and only opened the gate the second time he was requested to because he was afraid of the guns. This fact is consistent with that of the defence where in evidence Samson Kilman said he requested the sentry to open the gate twice. John Tokole gave evidence to that effect and Hanghang Reuben said and I quote from my notes,

'Samson asked, olfala i stap?'

and the Security replies 'yes'.

Samson Kilman asked the Security to open the gate.

Hanghang Reuben said, 'sentry i no openem gate.... i stap go go i askem bakegen.'

Then the sentry finally opened the gate.

Further it is submitted that the Defence raise no issue with the fact that the President was taken in the early hours of the morning when none of his personal security men were around, to a waiting hilux and rushed off to the Airport to see one of their bosses Noel Tamata who with armed members of the VMF put the President on board a plane and flew him to Malekula and then back to Vila.

The Prosecution referred this Court to the Court of Appeal case of *R v. Willard* (1978) 3 All ER at 163. The Court of Appeal held that for the offence of kidnapping to be proved all that was required to be established was a false imprisonment, that is, a deprivation of liberty coupled with a carrying away from the place where the victim wanted to be. This is the statement of law in regards to the offence of kidnapping. The Prosecution submit that in the case before the Court there exists clear evidence that the President was deprived of his liberty and there is also undisputed evidence that he was carried away. The Prosecution say he was carried away from the place he would rather have been if he was able to exercise his free will. The fact is that the President was coerced and was clearly faced with the threat of force.

The only issue raised by the defence is that the President consented. The issue of consent is a question of fact for the tribunal of fact to decide. This is stated in the kidnapping case of *R v. D* (1984) A.C. 778. The Prosecution submits that the evidence clearly shows that the President was coerced and was faced with immanent threat of harm. He was woken in the dark hours of the morning, 5.30am by armed members of the Vanuatu Mobile Force, none of his personal bodyguard were with him. The President, the Prosecution says acted otherwise than freely. This is clear in his answer to a question posed by Counsel for the Defence in cross-examination. Counsel asked, 'yu no bin refuse or talem long olgeta?'

The President replied, 'no mi no bin talem long olgeta, sipos mi refuse, mi no save mbae mi stap ia tedei or no?'

The President clearly did not want to find out what would happen if he refused to go. The very fact that they were armed was indicative that they may use the guns.

The Prosecution submits further that, in cross-examination Samson Kilman adopted his previous statement made to the Trading Post in an exclusive

interview in regards to the whole operation as the truth. His statements were that, 'Man makes the laws and not the Court so when the laws do not suit him it is his duty to change them.'

In a further question to him whether he had broken the law, Samson stated, 'you could say that we acted not in line with the law...'

2. The charge of Unlawful Assembly Contrary to Section 69 of the Penal Code Act CAP 135.

A. The Defence submission in respect to the Offence of Unlawful Assembly

Section 69 of the Penal Code Act reads, "*No person shall take part in an Unlawful Assembly.*"

Section 68(2) defines Unlawful Assembly as:

"When three or more persons assembled with intent to commit an offence, or being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause nearby persons reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly."

The Prosecutions is required to prove the following elements beyond reasonable doubt.

- (a) The presence of three or more persons.
- (b) Conduct in such a manner as to cause nearby persons reasonably to fear that the persons assembled will commit a breach of the peace.
- (c) Intent to commit an offence or intent to carry out some common purpose.

(a) The presence of three or more persons

Prosecution brought evidence through Sangul Banabe there was Samson, Tokole and Hang Hang at the front gate of the President's house on 12-10-96. This satisfies the requirement of 3 or more persons. The Defendants did not deny having been there in their testimony, they deny being there for the purpose of committing an offence.

(b) Conduct

Prosecutions brought evidence of VMF men in uniform with arms and painted face at the gate to the President's residence on the morning of 12-10-96. The defence submits there are always uniformed men in the vicinity, at times with

guns, and the President on cross-examination did not deny seeing guns and uniforms all the time.

Evidence by Samson, Tokole and Hang Hang refuted any suggestions of painted face. This is three testimony against the two of the Prosecutions witnesses. The President in Court demonstrated some difficulties of visibility in the identification of Samson Kilman. The defence submits he could easily be mistaken as to the painted face.

The defence submits that their being at the President's House that morning was to compliment the status of the President.

They further submit there are some reasonable doubts that this element is proved on the standard required.

(c) Intent

The Defence submits this offence was created to justify preventive action.

Section 68 (3) of the Penal Code Act reads:-

When an unlawful assembly has began to execute the purpose for which it assembled by a breach of the peace and to the terror of the public, the assembly is called a riot.

Archbold (42nd Edition) at Page 2123, paragraph 25-5, it is stated that an unlawful assembly occurs where the purpose is not carried into effect nor is any endeavour made towards it.

In this case whatever the men intended was, it would seem, carried into effect. they have been duly charged with the commission of offences arising out of their actions. Therefore the Defence submitted the charge is inappropriate and unsustainable.

If in fact Your Lordship cannot find that the charge of kidnapping is proven on the standard then their common intent cannot have been to do anything unlawful, the charge cannot lie.

Archbold points out that this charge is normally related to treasonous or seditious behaviour.

Archbold also points out that it is undesirable to an ancillary charge if there is an effective substantive charge. For example a person who is charged with murder should not be charged with conspiracy to murder, unless it be by way of a backup. However, in this case if the charge of kidnapping fails then the unlawful assembly charge must also fail because unlawful assembly is not a backup charge.

Breach of the peace occurred according to the English Court of Appeal (1981) 73 CR. App. R.31 when harm is actually done or is likely to be done by a

person or in his presence to his property or a person is in fear of being harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.

If intent to kidnap is not proven the highest the Prosecution could go was to say there was intent to cause a breach of the peace. If there was no intent to kidnap by means of force, there cannot be intent to cause breach of the peace.

The Defence submits that in all the circumstances this element is not proven on the standard required.

B. The Prosecution submission in respect to the Offence of Unlawful Assembly

In regards to the charge of Unlawful Assembly, it is submitted that the essential ingredients that the Prosecution must prove beyond reasonable doubt are:

1. **3 or more persons assembled**
2. with **intent to commit an offence**

Halsbury's Laws of England Vol II at 504 para 856, states that 'to establish that an assembly is unlawful it is not necessary to show that it occurred in a public place. The **essential requirement** is the presence or likely presence of innocent third parties not participating in the illegal activities in question; it is the danger to their security which constitutes the threat to public peace and the public element necessary to the commission of this offence".

The Prosecution submits that evidence exists to substantiate and prove beyond a reasonable doubt that the above defendants did commit the offence of Unlawful Assembly. The above defendants did assemble together in the early hours of the morning when it was still dark. They armed themselves on their own motion and entered the State House to kidnap the President. The prosecution submit that the time 5.30am is important in this case to prove intent. The defendants had to strike when it was least expected. And that is exactly what happened. Further the fact that they were armed also goes to prove their intentions to carry out their operations.

The presence and danger to the security of the President, his wife and the Sentry officer at the State House is evidence that satisfies the essential public element necessary to the commission of the crime of Unlawful Assembly. The presence and danger to the security of the President through out the whole continuous transaction is also evidence to satisfy the public element of the offence.

It is further submitted that the above defendants did have knowledge of certain facts in order to form the criminal intent. Prosecutions submit that it is open for the court to make inferences from other facts and or circumstances by virtue of s.11(3) Penal Code Act CAP 135.

It is the Prosecution's submission that the offence of kidnapping in this case

should not be looked at in isolation as occurring only at the State House but that it should be seen as one continuous transaction. Facts existing in this case clearly show this.

3. The offence of Complicity to kidnapping Contrary to Sections 30 & 105 (b) of the Penal Code Act CAP 135.

A. The defence submission in respect to the charge of complicity to kidnapping.

Section 30 and section 105 (b) Penal Code Act CAP 135. Particulars of the offence are Noel Tamata, yu stap wok olsem wan memba blong Vanuatu Mobile Force, mo yu holem wan rank blong Superintendent. Samtaem long namba 12 October, yu bin help blong causem se sam membas blong Vanuatu Mobile Force I go kidnappem President blong Republic of Vanuatu.

Whether or not it is important prosecutions has not tried to prove that Noel Tamata is a Superintendent. Time after time he was referred to as Major Noel Tamata. Furthermore there is no exact date as to his course of offence whether in 1996 or in 1995 or 1997. We can only assume it is 1996.

Further the particulars suggests a procuring and not an aiding in the strictest application.

Section 30 of the Penal Code provides that any person who aids, Counsels or procures the commission of a criminal offence shall be guilty as an accomplice and may be charged and convicted as a principal offender.

The elements of complicity are:-

Aiding, counselling or procuring the offence of kidnapping.

It must be submitted on the outset that if the Court is unable to convict on the offence of kidnapping then this offence will not lie.

(a) Aiding and Counselling

According to this element Noel Tamata must be present where the offence is committed. We assume that the allegation of kidnapping started at the President's house. There is no evidence that Noel Tamata was at the President's Residence on the morning of 12-10-96 at about 5.30 am.

Neither was there evidence to show he knew the intent of the men at the President's house that morning to be an intention to kidnap the President.

Prosecutions brought evidence to show the Defendant was at the airport on the morning of 12 October, 1996 and that he was on the plane with the President from Port Vila to Malekula and back. He was not charged with Kidnapping but with complicity.

The Defendants whose witnesses testified seeing him at the airport, disagreed with any suggestion of playing a superior role than the fact that he is there to receive the President because they not only know each other but they are closely related, as the President put it "mi ia", and to further assure the President of his safety.

In the circumstances the Defence submitted I will have more than a reasonable doubt as to whether or not this element is proved.

(b) Procuring the commission of The Offence of Kidnapping

Prosecution has attempted through witness Sandy Moses to suggest their boss was Noel Tamata that he made the order for them to take the President.

On cross-examination he confirms that all decision in Standdown group only take place through the group's discussion. That he was not present during the time when this decision was taken to go to Malekula and he does not know what the purpose of the trip was.

The Defence submit there is a requirement his involvement needs proven prior to the Commission of the offence. Prosecution needs to show a casual link between what Noel Tamata may have said or done before the time of the offence, about the offence. There was no such evidence. *D.P.P. for Northern Ireland v Maxwell* (1978) 3 All ER 1140 is authority for the proposition that the Defendant must be shown to have knowledge that Force or Fraudulent means would be used to take the President to the airport.

There are no evidence by the Prosecution on this point and the Defence submitted there are clear reasonable doubts that this element is proved.

B. The Prosecution Submission in relation to the offence of Complicity to Kidnapping

In regards to the charge of Complicity to kidnapping against the one defendant Noel Tamata, it is submitted for the Prosecutions that the essential elements that the Prosecutions must prove beyond a reasonable doubt are:

Noel Tamata did **aid, counsel or procure** the **commission** of the offence of Kidnapping.

Evidence from the Defence witness Samson Kilman clearly refers to Noel Tamata on numerous occasion as their boss. He said in his evidence to the President, "Yu kam wetem mifala long airport blong luk wan boss blong mifala". Hanghang Reuben further stated in his cross-examination that Noel Tamata was the only high officer and referred to him as a leader.

Further evidence of the role that Tamata played in this whole transaction of firstly having the President brought to him at the airport, meeting the President at the airport and then taking the lead role in the taking of the President to Malekula to meet the Deputy Prime Minister Barak Sope and then returning to

Vila is direct evidence of his aiding and procuring the commission of the offence of kidnapping.

That is the end of the Prosecution and Defence submissions.

I saw and heard all witnesses in this case. Before I go on further, I wish to say something about corroboration. It is to be noted that at Common Law, one witness is sufficient in all cases at the trial (with the exception in Perjury (see *DPP v Mester* (1972) 57 CR. APP R. 212 H.L., per Lord Diplock at p.242). In *DPP v Kilbourn* (1973) AC 729, 57 CR AP R. 381, H.L. Lord Hailsham said this:

"Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible" (at p.402)

and in the same case, Lord Reid said:

"There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with the statements or circumstances relating to the particular matter; the better it fits in the more one is inclined to believe it..."

Further in *DPP v Boardman* (1975) AC 421 60 CR.APP.R. 165, 183, Lord Hailsham went on to say:-

"when a (Tribunal of facts) is satisfied beyond doubt that a given witness is telling the truth, they can, after a suitable warning, convict without corroboration what I said (and meant) was that unless a witness was intrinsically credible he could neither afford corroboration, nor be thought to require it."

Bearing that warning in mind, I now look at the particular facts of the case with care.

In respect to the offence of Kidnapping:

It is to be noted that in order to understand the charge of Kidnapping of the President of the Republic, the facts of the case show that the starting point of the whole transaction was the State House, then the Airport, Malekula and back to Vila.

Four (4) elements have to be proved by the Prosecution beyond reasonable doubt.

1. The removal of the President from one place to another.

There is evidence that the President was taken from the State House to a waiting truck, then to the Airport. He was then put on board the plane to

Malekula and back to Vila on 12 October 1996. There is no dispute about that.

Further the President gave evidence that on 12 October 1996, he had no plan for that day because he was just woken up that morning. Sam Teddy, Sokovman Woflolan, Rolland Malesu who are all security officers attached with the Head of State gave evidence to the effect that none of them knew about any tour planned for the President to go on Malekula on the 12th October 1996.

They gave evidence about the attempt they did to locate the whereabouts of the plane in which the President was taken. In this case, the evidence shows that the President was carried away from one place to another place. The President was carried away from a place he would rather have been if he was able to exercise his free will (at home with his wife and children). The President was, thus, deprived of his liberty (See the Court of Appeal decision in *R -v- Willard* (1978) 3 All ER at 163). This element is therefore proved beyond reasonable.

2. By fraudulent means (a) or by force (b):

a) By Fraudulent means induce

The evidence of the Prosecution is that of the witness President Lenelcau who testified to the effect that Samson Kilman told him when he opened the window to come and go with them at the Barracks but after they had driven passed the road to the VMF Camp, the President gave evidence he was told they were going to the airport.

The Defence contra-argument is that the evidence of Barnabe Sangul is that he thought they were first going to the VMF Camp, and when they drove passed, he thought they were going to see a Minister. It was also said that the evidence of the Sentry Barnabe Sangul shows that the President replied to Samson Kilman by saying "ol raet" and he did not mention anything about the trip to the Barracks then.

Samson Kilman also testified he told the President they were going to the airport to see one of their bosses and then they will go to Malekula and return with the Deputy prime Minister Barak Sope.

The Prosecution evidence is not sufficient to prove the inducement by fraudulent means beyond reasonable doubt. Therefore this element is not proved on the basis of required standard.

b) By force compel

As to whether the President was forced or there were threats of force or coercion against him, the President testified to the following effect:

"Taem we yu karem masket yu stanap long face blong mi, hemia yu forcem mi ia ... Taem ia mi save, from mi gat 64 years ia, taem yu karem masket yu stap long face blong man, yu pentem yu long ol

kala mo yu putum ol uniform blong army, never maen yu no forcem mi mo holem mi sakem mi outside, but wetem masket mi fraet from laef blong mi".

Under cross-examination he said:

"... mi no bin save se bae i gat wan (1) plan i olsem ia blong oli tekem mi blong go tekem Barak Sope i kam blong solvem problem blong olgeta VMF".

The evidence of this witness (President Léyé) further shows that if Samson – Kilman was coming alone, he (President) would not be surprised because he would know that he (Samson) came to see him for something. But as he said, he was surprised because behind Samson, another VMF Officer stood up and carried with him a gun.

It is extraordinary. No official tour was planned and arranged for the President to go to Malekula and to take the then Deputy Prime Minister Sope Barak. None of the Head of State Security Officers were aware and were present apart from the Sentry Officer Barnabe Sangul who himself did not know why the Defendants came to see the President at the early hours of 12 October 1996 when it was still dark.

As the President's evidence further shows:

"... mi no talem long olgeta se long 5. 30am yufala i kam wakemap mi, oli jas kam long tingting blong olgeta nomo... olgeta nao oli kam from mi wetem masket, masket i askem, but sipos oli bin askem witaot masket, mi wait long sekuriti blong mi. But taem i gat masket behaen, evriting mi mas go".

There is no dispute at all that the President was taken in the early hours of the morning when none of his personal security men were around, to a waiting hilux and rushed off to the airport to see one of the bosses of the VMF Officers Noel Tamata who with armed members of the VMF put the President on board a plane and flew him to Malekula and then back to Vila.

The defence put to the President that he is familiar with VMF Officers carrying guns when he inspected the guard of Honours.

The President answered:

"Taem we mi inspektem guard of Honour long ol Mobile, hemia olgeta Mobile oli givim respect long wan bigman we oli save. But style ia we uniform blong Mobile, paintem face i kala, kala blong man ino luk save yu mo masket olsem (in front) hemi different stori ia".

He further said:

"Taem man i karem masket i kam long doa blong haos we mi slip long hem, ale oli talem long mi se mi go, hemi masket i forcem mi blong go. Hemi i different long hemia we man i karem masket i stanap long gate i givim hona taem you pass blong go insaed mo hemia we ol guard of Hona oli mekem oltaem. Be taem masket i point se yu go long trak, hemi laef blong mi ia. That is why mi go insaed long trak from we mi no need blong go insaed long trak bat mi mas go... Taem oli shoem masket long mi i min se mi mas go insaed long trak..."

The defence further put to the President why he did not refuse to go to Malekula with the VMF Officers.

The President said:-

"No mi no save talem se mi no save go from olgeta bihaen oli holem masket istap. So mi gat no way blong go. Mi mas go nomo... Sipo mi refuse, bae mi stap here today or no?"

In respect to the element of force, I bear in mind of the warning that it is dangerous to convict the Defendants on the basis of the complainant/President's evidence alone, I have no doubt at all that the President followed the Defendants to the airport on the 12 October 1996, under the fear of the threat of force and coercion.

The case of *Public Prosecutor v Walter Kota & Others* (1989 - 1994) 2 Van. LR at 664 is the authority for the proposition that:-

"the use of the word 'force' in section 105 (b) refers not only to physical force, but coercion and the threats of force."

In the case before the Court, the President was coerced and submitted himself in fear of the threat of force. This is a clear case of submission. The second element of kidnapping is also proved beyond reasonable doubt.

3. The removal of the President ... without his consent.

Let me remind myself that the defence point out that this case is not a case where the President/complainant was struggling. There was no threats of force or violence of anything of that sort. The defence says the President consented to go with the defendants when he told Samson Kilman "olraet mi kam", "olraet yumi go nao." The President did not refuse to go with the Defendants and that was purported to mean that the President consented. That of course depends on why and in what circumstances the president said "olraet mi kam", "olraet yumi go nao".

Was it because he was consenting, or was it because he was going with the Defendants of fear or constraint or coercion, so that he went with the defendants without consent? It is a matter for the tribunal of facts to decide.

It is not disputed that Samson Kilman knocked at the President's window and when the President opened the window, Samson Kilman said he wanted to see him. The President told Samson Kilman to wait at the door. This was confirmed by the evidence of Samson Kilman. This is exactly when the President told Samson Kilman "olraet mi kam".

But when he came outside, he was surprised because he saw another VMF Officer behind Samson Kilman. He could not recognise that officer because he was dressed up with army uniform, had painted face and held a gun in front of him. I reject the evidence of the witness John Tokole when he said he held his gun at his back and did not have painted face.

It was at that time that the President asked about his security guard and he was told not to worry about his security because the Defendants will look after him. The evidence of the Defendants (Samson Kilman, John Tokole and Hang Hang Reuben) show that they saluted the President and they carry the gun which is a sign of respect to the Status and authority of the President. I find it difficult to believe the Defendants. If they seek the President's assistance to talk to Sope and brought him back to Vila, to solve the problem of their allowances with the Government, they should have informed the President in the first place. Further if the Defendants paid respect to the Status and authority of the President they should not come and wake him up at 5.30 am when it was still dark and none of his Security Officers was aware of the plan and none of them was at the State House as the evidence of the Prosecution show to that effect. As the President said, the problem of allowances is not his business, it is the business of the Government with the Defendants ("*mi ia mi gat nating ia, hemi problem blong olgeta wetem Government*").

The evidence of the President shows further that when a man come to the door of his residential home with a gun and ask him to go with him, he must go, that is his life. As he said further he could not refuse to go with the Defendants. None of his personal security Officers were around. He has no choice because the Defendants hold a gun behind him so he had to go with them. It was under these circumstances that President, said "*olraet yumi go nao*" after putting his shoes. Was the President consenting to go with the Defendants?

Having considered all the evidence in this matter, applying the combined good sense, experience and knowledge of human nature, and modern behaviour to all the relevant facts of that case, I found that the President was going with the Defendants because of fear of the threats of force or constraint or because he was coerced so that he went with them without consent.

In that respect, I share the view that the law as it now stands consent may not only be vitiated by force or threats of force, or fraudulent means or threats (other than threats of force) but also that other intimidation may be sufficient to negative consent, (see *R -v- D* (1984) AC 778).

The fact that the President invited two defendants (Tamata N & Samson K.) to drink kava after the incident constituted, it will seem an implied and/or apparent acquiescence. But this does not necessarily involve consent. In that regard, the evidence of the President shows that the Defendants will be dealt

with according to law and that kava ceremony is the custom side to clear their faces.

The third element of the offence of kidnapping is also proved beyond reasonable doubt.

4. Without Lawful Excuse

The evidence of the defence witness Hanghang Reuben shows that the Defendant were armed (except Samson Kilman) on their own motion. No order was made by the VMF Commander. They armed themselves to carry out "Thunderbolt" operation. This element also is proved beyond reasonable doubt.

As to the Offence of Unlawful Assembly:

3 elements to be proven beyond reasonable doubt by the Prosecution.

1. 3 or more persons assembled

Prosecution witness Sangul Banabe gave evidence that on 12 October, 1996 there were more than 3 persons at the State House: Samson Kilman, John Tokole, Hanghang Reuben. This element is made out on the Standard required.

2. Conduct.... to cause nearby persons reasonably to fear that the persons so assembled will commit a breach of the peace, or will ... provoke other persons to commit a breach of the peace.

The essential requirement to establish that an assembly is unlawful is the presence or likely presence of innocent third parties not participating in the illegal activities in question. It is the danger to their security which constitutes the threat to public peace and the public element necessary to the commission of this offence: (See Halsbury's laws of England Vol. II at pp. 504 para 856).

The evidence shows that the Defendants went to the State House in the early morning of 12 October 1996 at 5.30 am when it was still dark. They were armed themselves on their own motion as testified by Mr Hanghang Reuben. The President, Mrs Lenelcau and Sentry Officer Barnabe Sangul reasonably fear their security at the State House. Security Officer Sokovman testified that when he arrived at the State House in the morning of 12 October 1996, he saw Mrs Lenelcau crying and she told him that the President was taken away by the VMF officers.

The evidence of the Prosecution witness Sokovman also show that Samson Kilman posted some of the armed VMF Officers to cover the area when the plane landed at Beauerfield airport, which indicates the danger of the security of the President throughout the operation as testified also by the President:

"Assurance blong mi olsem President Léyé ino gat".

This element also is established on the standard required.

3. With intent to commit an offence or intent to carry out some common purpose.

The Defence witnesses Samson Kilman, John Tokole and Hanghang Reuben gave evidence that they went to the State House on 12 October 1996 at about 5.30am. They were armed (save Samson Kilman). This is an important fact which proves intent.

It can also be inferred from the circumstances and the conduct of the Defendants that by taking the President of the Republic from the State House with arms, rushing to an awaiting truck and driving him to the airport and putting him on board a plane to Malekula and back to Vila with the then Deputy Prime Minister Barak Sope constitutes the evidence of the intent to carry out some common purpose.

This element also is established beyond reasonable doubt.

As to the offence of complicity to Kidnapping which was laid against Defendant Noel Tamata.

Section 30 of the Penal Code provides that:

"Any person who aids, counsels or procures the commission of a criminal offence shall be guilty as an accomplice ...".

The classic concern about the secondary parties situations is about the interpretation of the terms: "aid, counsel or procure".

By paraphrasing the decision of the (English) Court of Appeal in the *Attorney General's reference (No. 1 of 1975)* (1975) Q.B. 773, it can be said " ... if these words are employed here "aid, counsel or procure", the possibility is that there is distinction between each of those three words, because, if there was no such difference, then the Parliament would be wasting its time with three words when one or two would do".

It must also be understood that each of these words represent three separate concepts so that if all three words are used in the charge, as in the present case, it is sufficient that the evidence establishes the Defendants' conduct satisfies one concept that either activity (aid, counsel or procure) is sufficient to found liability as a secondary party.

As to aiding:

"Aid" implies to give help, support and assistance. The evidence shows that the President was taken to the airport. Noel Tamata was waiting for him. Tamata took the President in a small room. He ordered the VMF Officers to board the plane to Malekula. (see evidence of Barnabe Sangbul). Aiding requires that the accused Noel Tamata be present at the commission of the offence. Noel Tamata was not present at the commencement of the commission of the offence of Kidnapping. But he was in the middle of the whole transactions. He participated actively by encouraging other members of the VMF to board the

plane. Tamata knew the essential matters which constitute the offence. He need not actually know that an offence has been committed because he may not know that the facts constitute an offence and ignorance of the law is not a defence (See Section 11 (1) Penal Code Act CAP 135). See also *Johnson -v- Youden* (1950) 1 K.B. 554. The activity of "Aiding" in the process of the participation in the commission of the offence of kidnapping can be met at any time (before or during the commission of the offence). In this case, the circumstances of the commission of the offence of kidnapping start at the State House, then to the airport, Malekula and back to State House (Vila).

This element of "Aiding" is made out on the standard required.

As to counselling

"Counsel" should be given its ordinary meaning of "advise or solicit". Counselling connotes that the accused advised or solicited, or again encouraged the commission of the offence through the principal. Causation here is not necessary. The Principal Defendants must be aware, of the encouragement or that they have the approval of Tamata to do the relevant acts.

The evidence of Sandy Moses shows that Noel Tamata led the group of VMF Defendants who took the President to Malekula and back to Vila. This evidence was corroborated on numerous occasions when Tamata was referred to as one of the Defendants Bosses (See evidence of Samson Kilman, John Tokole).

There is also evidence that the decisions made by the Defendants are made together in group after discussions.

On the basis of these facts and considering the fact that Tamata is one of the bosses of the group of the Defendants and also the fact that he was the leader of the group who took the President to Malekula it can be inferred that he was one of the members of the group who advised or solicited the kidnapping of the President by Samson Kilman and others (the Principal). There is no doubt that there is contact between the principal offenders (Samson Kilman and others) and the secondary party (Noel Tamata) and there is also a connection between counselling and the kidnapping. The evidence of Livo Lui shows that, once on Malekula Noel Tamata told them words to the following effect:

*"Samting we mifala i askem oli no wantem, mifala i karem
President i kam; mifala i mekem long wan pisful wei nomo".*

Further, the President testified that, on Malekula, when the then Deputy Prime Minister B. Sope told Tamata that the move they have taken to take the President is too 'big', Noel Tamata said words to this effect:

"Yes but naoia yumi mas go back".

This is a clear evidence of the encouragement the Defendant Tamata did in the commission of the offence of kidnapping by the Principal Offenders. This evidence shows that the President was taken, to Malekula as a 'tool' or a

'means' to put pressure on the then Deputy Prime Minister Sope to come to Vila. It can be inferred that this was instigated, solicited by the Defendant Tamata as one of their Leaders and also as one individual member of the standown group who participated in the group decision to kidnap the President.

This element also is proved beyond reasonable doubt.

As to procuring

"Procuring" means "to produce by endeavour". The prosecution needs to show a casual link between the conduct of Noel Tamata and Samson Kilman and others. There is a requirement that procuring must occur prior to the commission of the kidnapping.

The Prosecution must show that Tamata has actual knowledge of the circumstances which constitute the offence. The evidence shows that Noel Tamata is one of the Defendants. He is also one of their leaders. There is also evidence that decisions of the Defendants were made after group discussions. It can be inferred that as one of the leaders of the Defendants (Principal) he took an active role in the planning of the operation "thunderbold". This of course occurred before the Defendants (Principals) came to the State House. Further Tamata waited for the President at the Airport. The President was brought to him there. This evidence shows that Tamata has actual knowledge of the circumstances which constitute the offence. There is no doubt that the evidence shows a casual link which exists between the conduct of Tamata (secondary party) and the Defendants (Principals). This element of "Procuring" is proved beyond reasonable doubt.

I accordingly, believe that the evidence, taken as a whole compels the following findings which I now make:

1. That I am not satisfied beyond reasonable doubt that on or about 12 October 1996, the above Defendants kidnapped the President of the Republic of Vanuatu by fraudulent means to induce him, contrary to Section 105(b) of the Penal Code Act CAP 135.
2. That I am satisfied beyond reasonable doubt that on or about 12 October 1996, the above defendants kidnapped the President of the Republic of Vanuatu by force, contrary to section 105(b) of the Penal Code Act CAP 135.
3. That I am satisfied beyond reasonable doubt that on or about 12 October 1996, the above defendants did commit the offence of Unlawful Assembly contrary to section 69 of the Penal Code Act CAP 135.
4. That I am satisfied beyond reasonable doubt that on or about 12 October 1996, Defendant Noel Tamata committed the offence of complicity to kidnapping, contrary to section 30 & 105(b) of the Penal Code Act CAP 135.

VII VERDICT

A. I find the following Defendants:-

Samson Kilman

John Tokole

HangHang Reuben

Peter Moses

Masden Garae

Danstan Hury

Kalmasei Philip, Not Guilty of the offence of kidnapping the President by fraudulent means, under section 105 (b) of the Penal Code Act CAP 135.

B. I find the following Defendants:

Samson Kilman

John Tokole

HangHang Reuben

Peter Moses

Masden Garae

Danstan Hury

Kalmasei Philip Guilty of the offence of kidnapping the President by Force contrary to section 105 (b) Penal Code Act CAP 135 and convict each of the above Defendants on the said charge accordingly.

C. I find the following Defendants:

Samson Kilman

John Tokole

HangHang Reuben

Peter Moses

Masden Garae

Danstan Hury

Kalmasei Philip Guilty of the offence charged in Count 2 of Unlawful Assembly contrary to section 69 of the Penal Code Act CAP 135 and convict each of the above Defendants on the said charge accordingly.

D. I find the Defendant Noel Tamata Guilty of the offence charged in Count 3 of Complicity to Kidnapping contrary to sections 30 & 105 (b) of the Penal Code Act CAP 135 and convict him on the said charge accordingly.

DATED AT PORT VILA this 23rd Day of July 1997

BY ORDER OF THE COURT

**JUSTICE LUNABEK VINCENT
JUDGE OF THE SUPREME COURT OF VANUATU,
ACTING CHIEF JUSTICE**



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