

PUBLIC PROSECUTOR

-V-

EILON MASS

Coram: *Mr. Justice Oliver.A.Saksak*

Counsel: *Ken Massing for Public Prosecutor
Daniel Yawah for the Defendant*

Date of Hearing : *Monday 10th – Friday 14th August 2015*

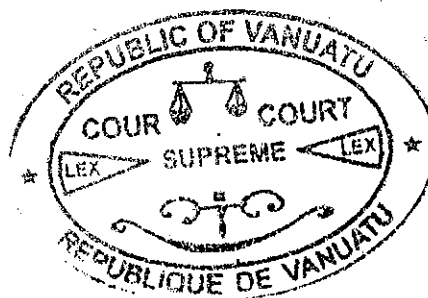
Date of Verdict: *Friday 14th August 2015*

Date of Reasons: *Tuesday 18th August 2015*

REASONS FOR VERDICT

Introduction

1. The defendant Eilon Mass (EM) was charged together with a group of 29 men and young boys from Kole Village. He was charged with Inciting and Soliciting the offences of Unlawful Assembly and Theft under Section 35 of the Penal Code Act [CAP.135] (the Act) in conjunction with Sections 69 and 125(a) of the Act.
2. 29 of those men pleaded guilty to charges of unlawful assembly and theft and 2 pleaded guilty to an additional charge of intentional assault. These were convicted and sentenced by Justice Harrop on 19th December 2014.
3. EM however sought an adjournment to fully brief Counsel before entering pleas of not-guilty to both charges before the Chief Justice on 18th February 2015.

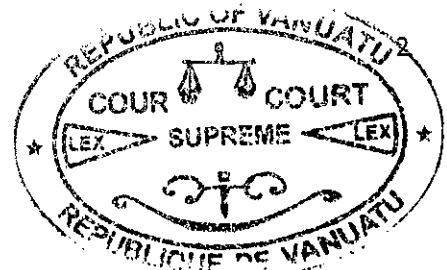


The Charges

4. EM was charged under Count 1 with Inciting & Soliciting Unlawful Assembly contrary to Section 35 in conjunction with Section 69 of the Act. It is charged that on or about 21st September 2014 EM incited and solicited a group of 29 men namely Peter Servet, Skip Ser, Micheal Toto, Jacky Joseph, William Kalreth, Collin Fred, Hosea Toto, Usah Ligo, Roy Ser, John Toto, Rene Samson, War Toto, Steve Peter, Toto Sul, Amson Sam, Paul Samson, Kalvet Fred, Winston Iavro, Steven Colin, Jackson Iavro, Jim Berry, Alick Toto, Yankee Collean, Toto Jean, Brightly Sam, Charles Toto, Junior Titus, Kenny Nisa and Brian Rotul to commit the offences of unlawful assembly and theft.
5. And in relation to Count 2 EM was charged that on or about 21st September 2014 he incited and solicited the same 29 men to commit offences of theft at Velit Bay .(V.B)

The Facts

6. On Sunday 21st September 2014 after church a group of people gathered at Kole Village after which the group travelled down to VB on trucks. Arriving at the gate to the VB property the chiefs and other men waited at the gate. They were met there by EM and Peter Terry who had brought over his trucks at the request of EM for the purpose of assisting him in the removal of an Oil Mill Machine and related equipment from VB property. EM and some chiefs waited at the gate. Peter Terry and his two trucks (camions) went down with the 29 men on other trucks to the property. Upon arrival the group of men removed the Oil Mill machine and related equipment from the Mill Shade, entered the Manager's residence and took away personal effects and properties and ransacked and damaged properties. The men entered the beach Bar and emptied the bar of its alcoholic drinks, smashed bottles on the floor and destroyed properties and equipment and threatened staff, workers and security officers. The group of men then loaded about 5 trucks full of machine, personal effects and properties and left the scene. Upon arrival at the gate, the Police had been alerted and had arrived and were waiting.



Heated arguments and instances of assaults took place at the gate as to where the machine and properties taken by the group of men should be taken and kept. In the end the Police succeeded and the trucks came to the Police Station in Luganville where every machine and property taken from VB were unloaded and stored at the Police Community Hall.

The Law

7. Section 35 of the Act provides for inciting and soliciting commission of offences as follows-

“It shall be unlawful to incite or solicit another person to commit any offence, whether or not that offence is committed. A person guilty of inciting or soliciting an offence may be charged and convicted as a principal offender.”

8. Section 68 of the Act defines unlawful assembly and riot as follows-

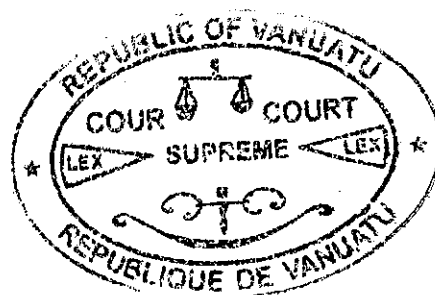
“1) When three or more persons assembled with intent to commit an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause nearby persons reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such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

2) It is immaterial that the original assembling was lawful if, being assembled, they conduct themselves with common purpose in such a manner as aforesaid.

3) When an unlawful assembly has begun 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”.

9. Section 69 states-

**“ No person shall take part in an unlawful assembly,
Penalty: Imprisonment for 3 years.”**



10. Section 125 provides for prohibition of theft misappropriation and false pretences as follows:-

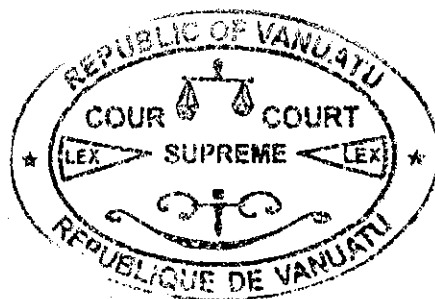
“ No person shall cause loss to another-

- (a) By theft,**
- (b)**
- (c)**

Penalty: Imprisonment for 12 years”

11. Section 122 of the Act defines theft as follows:-

- “1. A person commits theft, who without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof,**
- 2. A person shall also be guilty of theft of any such thing notwithstanding that he has lawful physical control thereof, if, being a bailee or part owner thereof he fraudulently converts the same to his own use or the use of any person other than the owner.**
- 3. For the purpose of subsection (1)-**
 - a) The word “takes: includes obtaining physical control-**
 - i) By any trick or by intimidation,**
 - ii) Under a mistake on the part of the owner with knowledge on the part of the taker that physical control has been obtained,**
 - iii) By finding, whether or not at the time of finding the finder believes that the owner can be discovered by taking reasonable steps,**
 - b) The words “ carried away” include the removal of anything from the place which it occupies but in the case of a thing attached, only if it has been completely detached,**
 - c) The word “owner” includes any part-owner or person having physical control of, or a special property or interest in, anything or being stolen.”**



Burden and Standard of Proof

12. Section 8 of the Act places the burden of proof on the prosecution to prove the guilt of the defendant on the standard of proof beyond reasonable doubt. This is both a legal and evidential burden of proof.

Elements to be proved

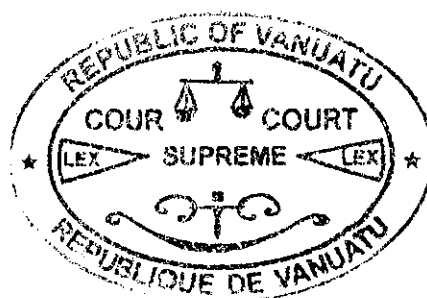
13. The elements required to be proven by the prosecution beyond reasonable doubt in relation to-

(a) Unlawful assembly are:

- i. That the defendant incited and solicited the commission of the offence of unlawful assembly of the 29 other men. (the convicted defendants)
- ii. That he specifically intended to cause the 29 convicted defendants to assemble at Kole Village and at VB.
- iii. That the 29 convicted defendants received communication and instructions to assemble by the defendant.

(b) Theft:

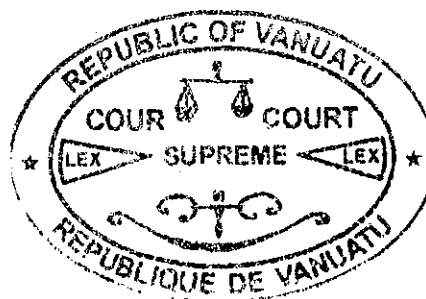
- i. That the defendant incited and solicited the offence of theft by the convicted defendants.
- ii. He specifically intended to cause the 29 convicted defendants to take and carry away properties and machinery at VB.
- iii. The convicted defendants received instructions from the defendant to take and carry away properties and machinery at VB.



Evidence By the Prosecution

14. The Prosecution adduced evidence from 11 witnesses. I summarize briefly only the relevant evidence of each prosecution as follows-

- (a) Fred Nisa- He saw EM go to see Chief Skip Ser at Kole Village on 20th September 2014 at around 7:00pm. EM told Chief Ser to go down to VB on 21st September 2014. The witness received this information and alerted Sean Griffin to lock the gate. He saw EM and the driver of a green taxi go to see Chief Ser. He saw EM go to the village many times and in particular on Friday and Saturday. The reason for going down to VB was to take his Oil mill machine.
- (b) Solomon David- He attended a meeting with EM and 5 other chiefs from Kole, Manioc, Natawa, Lonnoc and Lorum at Bamboo Motel. It was during the second week of September. The Chiefs present including himself were Chief Manasseh Vohor of Lonnoc, Chief Kalsei Paul of Lorum, Chief Peter Servet of Kole and his assistant Chief Skip Stephen Ser and Chief Jean Moses of Natawa. The meeting took place for about half-an-hour. EM told them to accompany him to the Police Station to ask for a search warrant, to report EM's Laptop, Oil Mill Machine and luggage at VB and to stop workers at VB from working. That EM told them he would give VT 1 million to each of the 5 villages if they were successful in getting the Police to issue a warrant.



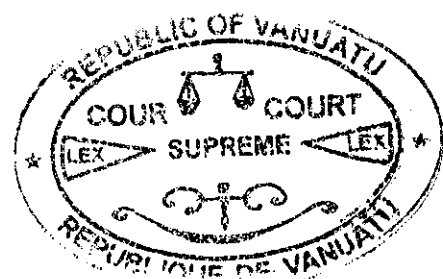
(c) Patrick Thomas-

A Security officer manning the gate to VB. He was at the gate at 1:00pm on Sunday 21st September. He went away for a while to relieve himself. He heard his children calling out that there was a fight at the gate. He returned and saw EM and Chiefs Peter, Kalsei and Charles, a boy from Kole Village. He saw the boys assault Will Harvey, the Manager. That EM told Will Harvey to take his passport and leave. That EM told the witness to stop work and return home. That the men put Will Harvey in a truck and drove him down to VB. That EM and some other men remained at the gate.

That the Police then arrived. He went into the house and took out a restraining order which restrained EM from entering the property. He showed the order to EM but was told it had expired. He saw the trucks return to the gate with the machines and properties. The police stopped the trucks. Chief Ser was giving orders that the trucks were to go to Kole to unload the machines and properties. But the Police namely Jean Baptiste Palo finally got them to calm down and all the trucks left to come to Luganville Police Station.

(d) Peter Bouchard-

He gave a history of how he came to know EM. That EM sought financial assistance from him including hire of his truck but these were never granted. EM asked him for a lift to Kole Village and he agreed to take him there at 4:30pm on Friday, he thought. EM then asked to be picked up for the return trip and they agreed to 8:00pm on the bitumen road. During his conversation with EM, there were bad things said by him about Ronan Harvey and that EM was trying to get the Villagers to rebel against Ronan Harvey. EM was using the same driver in the green taxi. Between Tuesday and Friday of that week EM visited twice. The purpose of the visit was to get the chiefs of

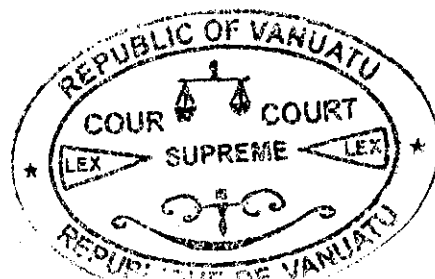


Kole and VB to enter VB by force. The reason being that Ronan Harvey had shot at 19 boys from the village who were entitled to compensation of VT 2 million. EM needed transport. On Saturday morning he returned and asked for a 2 meter chain and a lock. EM was serious about entering VB with some Ni-Vanuatu boys. Although he did promise to get the chain for Saturday night, he never left the chain there as promised.

(e) Sean Griffin-

Gave a history of how he first met and knew EM at VB. He learned that EM had been removed from VB by a Paul Talley on the instruction of the owner Ronan Harvey for inappropriate conduct. That he had been staying only as a guest there. That he was looking at setting up an oil mill facility to produce coconut oil.

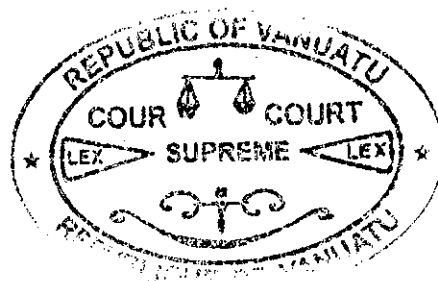
Regarding the 21st September 2014 incident, he had received a telephone call from Fred Nisa on Saturday night from Kole village saying that EM had organized a break-in at VB. He spoke to Will Harvey about how EM had been trying to remove or recover the coconut oil mill at VB during the week prior to 21st September. This made them decide to keep the gate locked and closed. He dropped his father off at the Airport and returned to VB later. Will Harvey had instructed that the gates be opened on Sunday 21st September 2014 to allow tourists and locals to visit and use the Beach Bar and facilities. Following the reports he had been receiving he attended on the Police in Luganville and sought assistance. The Police drove to VB ahead of him. Upon arrival he parked his truck and went to enter the property. There were 35 people around the entrance to the property. He got his camera and started to take pictures of what was happening. He was stopped by a man from going onto the property. The man said EM had given the instruction



to stop people going onto the property. He saw EM in the green taxi. Then he saw camions and trucks coming up the hill towards the gate. He spoke with Peter Terry, owner of the camions. He went inside the property and was taking pictures but was shouted at. He was punched and kicked by 2 men who took his hat and sun glasses. The police then intervned. He stood in disbelief at what had happened. The Police spoke with chief Skip Ser and the people involved. Then he saw the trucks leave to come to Luganville to unload the properties at the Police station.

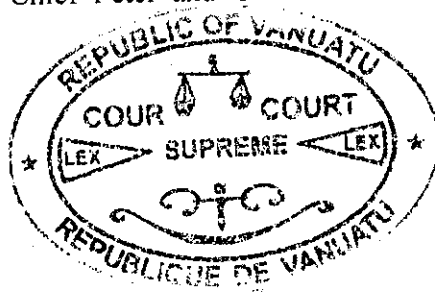
(f) Peter Terry-

Owner of 2 Camions and a truck who assisted the convicted defendants to remove the Oil mill machine and other equipment. He confirmed the trucks were his. There were 3 of them. Other trucks had joined to load other items and properties . He said he first knew EM when he had transported his machine from the NISCOL whart to VB upon EM'S request at the time. He confirmed being at VB on Sunday 21 September 2014. That on Thursday at 3.00 pm EM had gone to see him and asked him for assistance to move his machine back to town. He said he was busy and proposed that it be done on Sunday. That his proposition was agreed to by EM. He then told EM that he needed a forklift. That EM told him he would organize the boys to lift it up onto the truck and said he would go and get the boys at Kole to come and help. He then said "Okay you go and get organized and come back to me." They agreed and EM went away. He returned a short time later and said that he would organize but that it would not be in the morning as there was to be church and that it would have to be in the afternoon. That EM returned to him on Friday to confirm. Then he allocated 3 big trucks. On Sunday 21



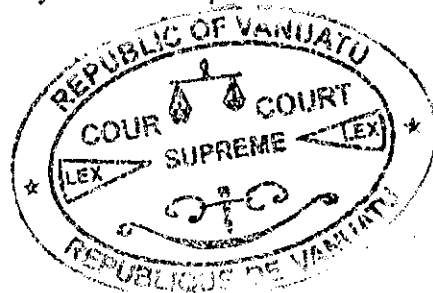
September 2014, they left at 12.00 pm. EM had instructed him that a smaller truck was to go to Kole village to pick up the boys. And that is what happened. The small truck went to Kole to pick up the boys and returned. They all joined together at the gate and made their way down to VB. They went straight to the workshop. The boys jumped down and ran to and fro carrying things and damaging properties. He saw the boys ransack the premises and destroyed properties. They removed properties from the residence and the Beach Bar and put them in the trucks. They only stood by and watched what the boys were doing. They were threatened when one of his drivers wanted to take pictures on his mobile phone. They were ordered to switch off every phone. They boys were drunk. He tried stopping them but they said everything was to go to the village Nakamal. They then left and proceeded to the gate. The police were there with the chiefs. He explained his position to the police officer Jean Baptiste Palo that he was only acting on EM'S instruction to remove his/machine. He talked with Sean Griffin and saw a boy assault Mr Griffin. The boys and the chiefs said everything was to be taken to the village Nakamal at Kole. But the police talked with the chiefs and they changed their minds. All the trucks then left for the Police Station in Luganville.

- (g) Godrinton Lonsdale- Taxi owner of the green taxi EM had been using and travelling in. He came to know EM as a result of him taking a relative of his from Torres Islands to become his "wife." He confirmed the green taxi is his and that his driver is from Malekula. On 21 September 2014 he confirmed he was in the taxi with EM. They stopped at the gate and watched what was happening. He confirmed that Chief Peter and Chief Paul from Lorum



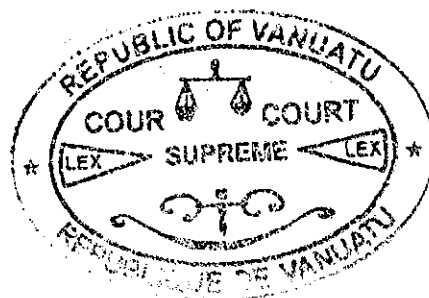
were with him and EM. That EM drove the car. He said he went with EM to Kole village twice. When refreshing his memory the witness said that first time was on 17 September 2014. That they went to the village in the evening. He only waited and slept as he had drunk kava. The second time was on Sunday 21 September 2014. Arriving at Kole village, the people were ready. The chiefs got into the car and they went down to VB. Prior to going to Kole he and EM went to look for the chain Peter Bouchard had promised he would leave on the grass. It was not there. EM called Chief Peter who answered that he had a chain with him. They then proceeded to Kole village. They picked up the chiefs and returned to VB. He left the car and went on foot to Shark Bay. On his return he saw a man remove his car key from EM. They had an argument and the man assaulted EM. The police returned his car key. They left and followed all the trucks that were returning to Luganville.

- (h) Jean Baptiste Palo - Police Officer. On 21st September 2014 he headed the afternoon shift. He was tasked to attend the scene with 4 other police officers. Upon arrival the gate was closed and many people were at the gate. 2 Chiefs from Kole and Thikula Noel were at the gate. EM was also at the gate in a taxi. They were stopped from entering by the chiefs. Then Sean Griffin arrived. EM left the taxi and approached him with a piece of paper saying it was a Court Order sent from Vila giving him the right to remove his property. They looked at the paper and discussed it. The camions and other trucks loaded with machines, tools, equipment and properties were coming up towards the gate. They assaulted Sean Griffin and they intervened. He identified the documents given by EM as a Supreme Court Claim. The 2



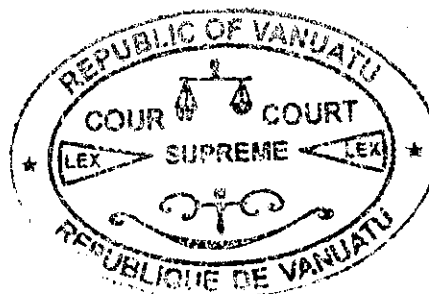
chiefs asked the officer to remove the police vehicle so the trucks could exit. He explained the risks of losing the properties to the chiefs who finally gave in and all the trucks left to Luganville to unload all the equipment at the Police Station.

- (i) Peter Solwie- The Crime Scene Officer. He attended the Scene in the evening of 21 September 2014 and took photographs of the staff house, the manager's house, the tool shade, the workshop, the Beach Bar and took exhibits. He saw extensive damage and destruction.
- (j) Andrew Stanley Leo A detective constable who contacted the Record of Interview (ROI) of EM. The defendant did not wish to answer questions unless he first spoke with his lawyer, Mr Yawha.
- (k) Marley Pau- A transport driver from Lorum. He confirmed he was present with the group on Sunday 21 September 2014. He was at Church. EM went to pass the word that they should go down to VB. It was Paul who conveyed the message to them. He took the chief and went to Kole to join the group there. They then left to go to VB. Arriving at VB they went down following EM's instruction to get his properties. They loaded the camions and returned to the gate and proceeded to town to unload the properties at the Police Station. He said there were 5 trucks there. He saw EM only at the gate and that was because there was a Court Order against him.



Defence Case

15. The defendant (EM) denied that charges of inciting and soliciting unlawful assembly and theft. His case was that-
- a. He was a former employee at Velit Bay (VB).
 - b. He had established an Oil Mill factory on the property of Western Pacific Cattle Company (WPCC).
 - c. He imported and purchased the Oil Mill equipment and machine from China and processed clearance from the wharf and engaged Peter Terry's trucks to uplift them to VB.
 - d. His relationship with Ronan Harvey (RH) turned sour and he was ordered to leave. He then filed a complaint against RH which was not investigated properly by the Police.
 - e. He filed a Supreme Court Claim claiming for loss of business against WPCC.
 - f. The villagers of Kole had a dispute of their own with RH after he made several shootings at 19 village boys. That there was no proper customary settlement which left some of the villagers still aggrieved.
 - g. He came to Santo from Vila for the purpose of obtaining a search warrant and when he found out about the dispute of the villagers he started engaging to assist them with their complaints which were never investigated by Police.
 - h. This gave rise to the meeting held on 17th September 2014 first at Bamboo Motel and later at the Police Station with Senior Inspector Atuary.

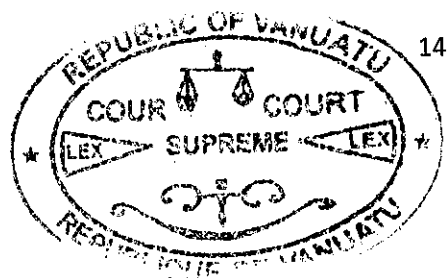


- i. Following disagreement and unwillingness by the Police to take appropriate action at the meeting of 17th September 2014, the chiefs got angry and decided to take the law into their own hands.
- j. When he knew of this, he took steps to secure his machines and equipment. That is why he approached Peter Bouchard (PB) for financial assistance, truck and chain and lock. Further he approached Peter Terry (PT) to engage his trucks to remove his machine.
- k. That he went to Kole Village with Godrinton Lonsdale in his green taxi on 18th September 2014 in the evening to speak to Chief Ser.
- l. That on 21st September 2014 he went with Godrinton Lonsdale to Lorum to collect Chief Paul Kalsei and then on to Kole Village to collect Chief Peter Servet and they travelled to VB gate. He remained in the taxi at the gate when the group of men went down to VB to remove the machine and properties.

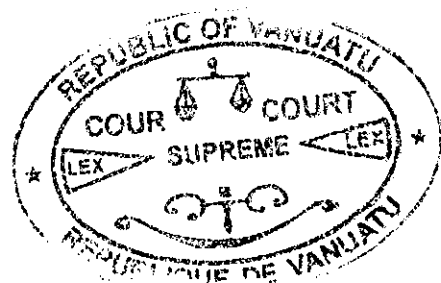
Evidence for the Defence

16. I summarise in brief the relevant evidence of the defendant and two other defence witnesses-

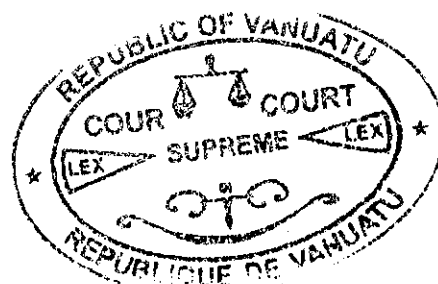
- (a) Eilon Mass- Defendant, an Israeli of 39 years old. He gave evidence of his background and his previous business dealings and operations taking him to Fiji and then on to Vanuatu. His purpose of coming to Vanuatu was to set up some processing business. He first met RH in 2010 during his first visit, when he stayed for 6 weeks in Santo. That RH asked him to come to VB. That RH heard EM was a chef specialized in healthfood and therefore asked EM to come but he refused. They kept in touch through emails. Then finally at the end of 2012 or in



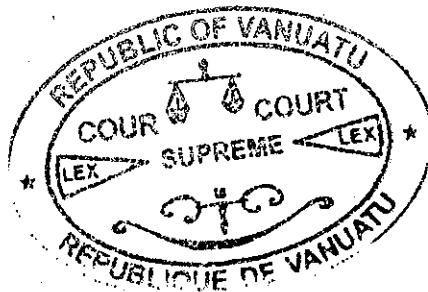
2013 EM moved to Vanuatu to start their business. He did a business plan which he presented to the Government for Big Bay but never did business there as RH had asked him to come to VB instead. So he came to VB. He was driven around and shown the land. He wanted to start a processing business. Later he wanted to do a resort. But RH "pulled" him to VB so that in March or April 2013 he moved in with his wife and son at RH's request. RH asked him to do a design for the construction of a resort and he worked on it for a few weeks but he wanted to start his own business. He contacted agents in China to locate and analyse best machinery for mass production of coconut oil. That RH gave him a gift to start and manage his business because RH had much problems with the village people who own the land. The gift was around VT 5 million with option to ask for more. By end of 2013 he started his Raw for Beauty business after getting approval from VIPA. The machine was shipped into Vanuatu from China addressed to him and Raw for Beauty. He asked Peter Terry (PT) to move the machinery on his trucks to VB at the time. PT assisted and the machine and equipment were taken to VB and installed. He was to start operation on 1st January 2014. The chiefs were with him. But a few days later he received an email from RH that he should leave Santo immediately and to leave Vanuatu. He left VB on 13th December 2013 after a Christmas Party. He left without his wife and son. He stayed for a while with Steve Quinto at Big Bay then went to Vila to lodge a complaint against Moise and RH for threats and drugs. The complaints were lost in the system and never investigated by police. He met several police officers in Vila including Head of CID but still there were no investigations. He then heard rumours about the shooting of 19 boys from Kole



Village. He sought the arrest of RH and RH was arrested and detained by Vila Police but never charged. He then sought assistance to obtain a search warrant. It was then he was advised by police to come to Santo and a search would be made. A search was made but nothing was found. So he took the decision to find the evidence himself. And that is the reason he came to Santo. When he came he spoke with Gray Vuke who referred him to Rex. He came to meet Rex but there was no search warrant. He did not have the file about the shooting on 3rd July 2014. He then went to see Willie Samuel who told him the case was closed. He returned to Vila and met Skip. He met Samuel Boe also. Skip told him the ceremony performed was not a proper custom ceremony. As there was no search warrant he wanted to do things his own way. He then returned to Santo and went to meet the Kole people to tell them about their case and his own. He explained that their case was still going on but that no one had gone to Kole or Velit Bay and then the 19 boys were shot at. That a new case had been opened against RH to stop him entering Vanuatu and opening his bags if he came in. He then realized there were two cases and so they started to have joint meetings for this purpose. He knew the 5 chiefs since he started at VB. The meeting in town was to get to the police to find ways to facilitate a solution. The purpose of the meeting at Bamboo Motel was to find out where the case was and to try and help out. There was no search warrant and he tried going to the police to see if they could reopen the case. He made Ronald temporary Head of CID at the time but it was not positive. Then they met with Ronald's boss but he was doing the same thing and chief Peter was beginning to have problems because of differences with the custom ceremony. They started getting

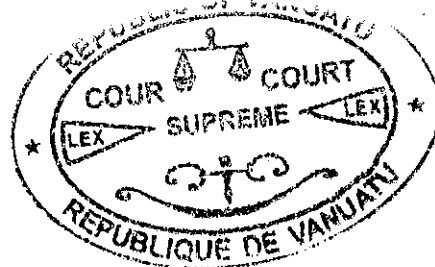


angry and were threatening. Then on 16th September he went to make an appointment with the secretary to see Senior Inspector Atuary. The next day he went with Godrinton, Skip and Peter Servet to meet the Head of Police, North Sup. Willie Samuel but he referred them instead to Sen.Insp.Atuary who told them the case was closed. They started going back and forth and Sen.Insp.Atuary said he didn't want to hear anymore and have anything none to do with their case, that he said they should go down to VB and sort out the problem with the current manager. At this the chiefs were very angry. They then left and went to the stalls at the Market to eat something. The chiefs told him the boys were angry and they were going to take a move. He then said he went to the village to try and speak to them. He then said Skip "pressured me that the boys would make a move on Friday". At that he wanted to safeguard his machine at a neutral place then go to Vila and hand the keys over to a judge. He said he told a couple of the boys he knew that if they go down that they should keep his machine safe. Then he confirmed meeting Peter Terry to request his trucks to move the machine. That PT told him he needed a forklift but that he would organize 19 boys to assist. Then he went to Kole and saw chief Ser and asked 2-7 of them the men to help. He confirmed meeting Peter Bourchard and asking for a chain and lock and that although promised, there was no lock and chain provided when he and Godrinton went to look on 21st September prior to going down to Kole. Then on 21st September 2014 he went to Shark Bay first but they were in church. Then he moved on to Lorum. Still there were in church but he meet the chief's son and asked if they could help him. And 15 men went along. He was surprised at this number. Then they went down to Kole where the group joined



in and they came down to Velit Bay. At the gate, the group went down to get the machine. While he went to Manioc and when he returned he saw Will Harvey (WH) beaten up. He said he did not have control at that stage. He had an argument with WH and that WH told him he could take his machines if he wanted to and to get out of the country. He waited in the car all the time as he was afraid of the workers. Then the police came around. And Torquil Macleod removed the car key from him and assaulted him twice with his right hand. He saw the trucks come to the gate with the machines, the first 2 trucks had the machine and equipment. The other trucks following had other stuff and properties, which he said he did not authorize them to take. He said he tried to find his documents in the car but found only his Supreme Court Claim which he showed to the Police Officer. He then identified some documents which he tendered as Exhibits D1, D2, D3, D4, D5 and D6.

- (b) Afreman Kender- A Policeman who took the witness statement of Will Harvey on 22nd September 2014. He merely confirmed taking the statement. The relevant part is paragraph 12 on page 3 that reads:
“ I told him if he wants the oilmill. I said to him take it but he said I have nothing to loose.”
The document was tendered as Exhibit D7
- (c) Stephen Remy- Self employed businessman involving earthmoving machines. He met EM only once when he was looking for space to store some of his machinery. He agreed to help EM and showed in his storage yard behind Kevin Henderson’s. The doors were



not in good condition but he agreed to rent it for a month at VT 25-VT 30.000. It was on a Friday in September 2014 that the meeting occurred. That EM told him he would find a lock and chain. Also that EM told him he had spoken with Peter Terry about moving the machines but that it would not happen on Saturday as it was PT's Sabbath but that it would happen only on Sunday.

The Issues

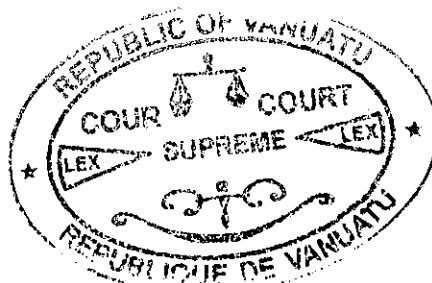
17. The issues for determination by the Court are-

- a) Whether or not the prosecution had discharged their duty of proof beyond reasonable doubt that EM had incited or solicited the offences of unlawful assembly and theft committed on 21st September 2014 by the convicted defendants?
- b) If so, whether or not EM became a principal offender in the second degree and could be convicted and sentenced as such?

Arguments and Submissions

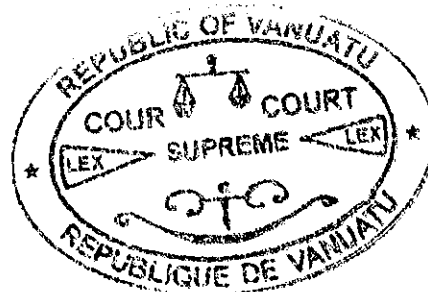
18. In his summary and closing submissions Mr Massing argued and submitted-

- a) In relation to whether or not the prosecution had discharged its onus under section 8 of the Act to prove EM's guilt beyond reasonable doubt, that the answer be in the affirmative, on the basis of the evidence adduced.
- b) In relation to whether or not EM became a principal offender and could be convicted and sentenced as such, that the answer be in the affirmative. The prosecution relied on the case of R.v. Jensen and Ward [1980] VR 24.

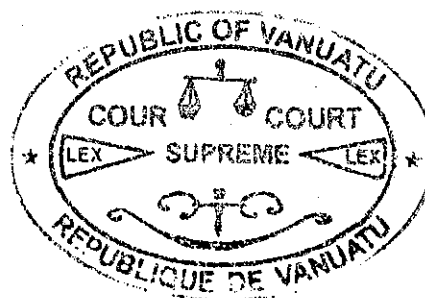


19. Mr Yawha for the defence on the other hand argued and submitted that-

- a) In the evidence of prosecution witnesses there were inconsistencies about the times and dates the defendant went to Kole to see Chiefs Peter Servet and Skip Ser.
- b) There were two separate-cases. One was between the community of Kole and Ronan Harvey because of alleged shootings of 19 boys and the other was between EM and RH for alleged threats and possession of drugs or cannabis.
- c) The defendant did not deny having meetings with the Chiefs of the 5 villages of Kole, Natawa, Manioc, Lorum and Lonnoc, and with the Police, but argued the sole purpose was to assist the chiefs and the police make some progress with the investigation of the two cases.
- d) The defendant has only one case, that he wanted to retrieve his machines and equipment irrespective of the dispute as to ownership of the machines which the Court has yet to determine in Civil Case 196 of 2014.
- e) That because the issue of ownership has not yet been decided, Mr Yawha argued that the charge of theft in Court 2 was unlawful. That the defendant had no duty to prove his innocence and further that the prosecutor had struggled with his evidence.
- f) For the charge of unlawful assembly Mr Yawha argued that only the evidence of Solomon David come close showing an assembling at Bamboo Motel with 5 chiefs present but that was not at Kole as charged. Further that the evidence of Fred Nisa was hearsay evidence. Further Counsel argued that the nature of the meetings were-



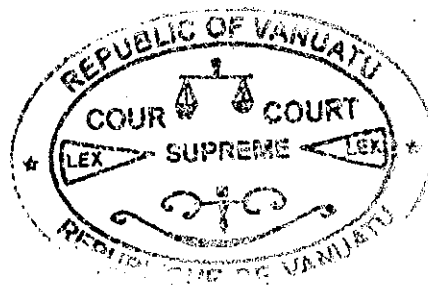
- a) To stop workers from working which did not amount to inciting,
and
 - b) To go to the police to get them to execute a search warrant which
did not amount to inciting or soliciting.
- g) That there was no evidence of any other meetings which show there was a
common purpose.
- h) That it became clear that the Kole people had a grievance with RH about the
shootings which were unresolved despite a purported customary held.
- i) There was no direct evidence to show the chain and lock sought and requested by
EM from Peter Bouchard was for the purpose of locking the gate to VB. The
defendant relied on the evidence of Stephen Remy and Peter Terry to disprove
that. Further that the defendant relied on the authority given by Will Harvey in his
witness statement tendered through Policeman Afreman Kender as Exhibit D7 as
giving the permission to retrieve the machines and related equipment.
- j) That there was no case of inciting or soliciting. That there was doubt and as such
the benefit of that doubt should be given to the defendant.



Discussions and Findings

20.1. I begin first by analyzing the evidence that shows there was unlawful assembly on 21st September 2014 and the EM had incited or solicited that assembly in the following manner-

- a) The first assembly at Kole Village occurred after church service on Sunday 21st September 2014. Godrinton Lonsdale whose taxi EM drove that day in his evidence- in- chief gave very clear evidence when he said that arriving at Kole, **“the people were ready”**. Peter Terry’s evidence confirms that he sent the smaller truck to Kole to pick up the boys on the clear instructions of EM given to him on Friday 19th September 2014. The defendant’s own evidence that shows a similar assembling at Lorum on 21st September 2014 where he said that on his way to Kole, he and Godrinton Lonsdale stopped at Lorum where he spoke to the chief’s son because the people were still in church. He gave instructions then that they were to go to Kole. And having gone to Kole, Marley Pau then arrived with the chief and 15 men and EM said he was surprised at this number.
- b) The Second assembling that day occurred at the gate to Velit Bay before the trucks and the men went down to take machines and other properties. Again Godrinton confirmed this assembling. Peter Terry, Patrick Thomas and Sean Griffin confirmed that gathering. The defendant himself confirmed that gathering.
- c) The third assembling occurred that day below at Velit Bay when the trucks went down with the 29 men who gathered at the workshop or machine shade. It was here that the men went on a rampage and ransacked the place. The evidence of Peter Terry clearly show this gathering.



20.2. Did the defendant incite or solicit those assembling?

The answer is in the affirmative and the following evidence clearly show this was so-

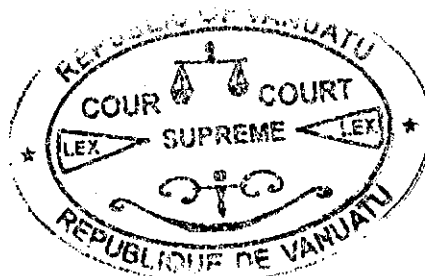
- a) The evidence of the defendant himself when he said that on 21st September 2014 on his way to Kole, he stopped at Lorum and spoke to the Chief's son telling him to go down to Kole with some men to help. Godrinton's evidence confirms this. Peter Terry's evidence is clear that on Thursday 18th September 2014 when EM went to ask him for his trucks EM told him he would organize the boys to assist him lift or remove the machine instead of a forklift. That was when PT told EM: **"Okay you go and get organized and come back to me"**. That explains why EM went back to Kole in the evening of Thursday 18th September 2014 to get the boys and men together and organized. EM then returned to PT on Friday 19th September 2014 to confirm to PT that he had organized as discussed and agreed on Thursday 18th September.

20.3. Was there a common purpose for those assembling?

The answer is in the affirmative from the evidence of Fred Nisa and Peter Terry which make it clear the purpose of the men going down into Velit Bay was to remove the oil mill machine and other related properties. Marley Pau also confirmed this purpose.

Further, the other common purpose was to stop the workers at Velit Bay from working. This was clear from the evidence of Patrick Thomas, Sean Griffin and Will Harvey and Solomon David. Further still another common purpose was to lock the gate to Velit Bay. The evidence of the chain and lock given by Godrinton Lonsdale and Peter Bouchard were consistent and confirmed that purpose.

- 20.4 Was it necessary for the prosecution to prove all the elements of unlawful assembly required under section 68 of the Act? The answer is in the negative. The prosecution needed only to show by admissible evidence that the defendant (EM) incited or solicited the unlawful assembling of the 29 convicted defendants including the defendant himself. The reason for this was that the 29 men had pleaded guilty to the charge of unlawful assembly

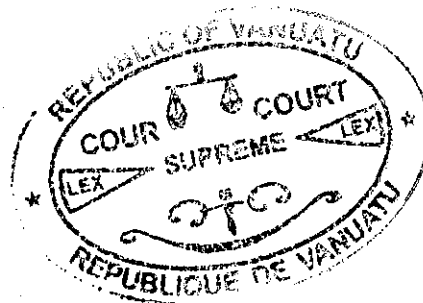


and theft as principal offenders. The defendant was charged as principal offender in the second degree. More will be said on this aspect later.

20.5 But now I turn to discuss the offence in Count 2 against the defendant, that on 21st September 2014 he incited and solicited the 29 convicted defendants to commit the offence of theft at Velit Bay. Again as the 29 co-defendants had pleaded guilty to the charge as principal offenders, it was not necessary for the prosecution to have to prove the elements of the charge of theft contrary to section 125(a) of the Act. The prosecution had to simply prove by admissible evidence whether the defendant (EM) incited or solicited the theft.

20.6 Did the defendant incite theft of the machine and other properties? The answer is in the affirmative. The instructions to remove the machine and obtain physical possession and control by taking came from the defendant himself to Peter Terry. This instruction was given to Chief Paul and Chief Peter Servet by the defendant by reasonable inference who then gave the instruction to the men. Marley Pau's evidence confirms this. The defendant's going to meet the Chief of Kole starting from 17th September through 20th September 2014 could not have been for any other purpose but to give instructions for the "taking" and "carrying away" of the machine and its related equipment.

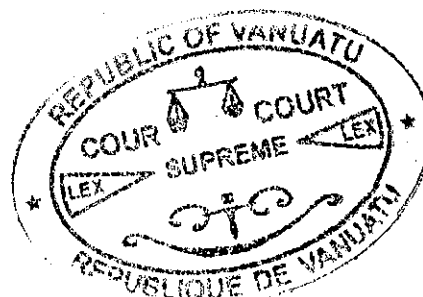
20.7 It is clear that the defendant's going to Kole Village and meeting the chief and the people from 17th September through 21st September 2014 was to give instructions for the taking and carrying away of the machine. In the course of these meetings the Court draws inferences that the defendant encouraged, provoked and stirred up the chiefs and his people to arise and go down to Velit Bay. This inference is drawn from the outcome of the chiefs meeting including the defendant with Sen. Inspector Atuary on 17th September 2014. All efforts and discussions to find amicable solutions failed and according to the defendant's own evidence he said "the chiefs were very angry". And after having lunch at the Food stall in the Market the chiefs had told him "the boys were angry and were going to take a move". This followed what Sen.Insp. Atuary had said that they should go and sort the matter out at Velit Bay with the Manager.



20.8 It is clear from that evidence of the defendant that he had knowledge of the move or action. When he subsequently went to see the chief at Kole from 18th September 2014, all he was doing by necessary inference was “inciting” the “ taking” and “carrying away” of the machine and other properties.

20.9 The real difficulty the defendant had and faced was that he was claiming ownership of the machine in fact only and he had not established a legal right to ownership and therefore his claim of ownership of the machine at the time was not made in good faith. The evidence of the defendant was that he had filed Civil Claim No.196 of 2014 against the WPCC for loss of business. That claim remains pending in this Court. The issue of ownership of the machine would have to be heard and decided in the course of that proceeding. The defendant however ran ahead of his case and used the Supreme Court Claim and deceived the people at the gate on 21st September 2014 that it was a Court Order authorizing him to have access to and to remove the machine. Clearly it was a “ **trick**” and section 122(3) of the Act prohibits taking and obtaining physical control of the machine by trick or intimidation. The defendant had as it were, “ **put the card before the horse**”.

20.10 Further in his evidence the defendant said he feared for the security of the machine and said he knew a couple of the boys in the group of 29 men who had assembled and instructed them that if they went down to Velit Bay that they should make sure the machine was safe. That instruction amounted to an advice or counseling or soliciting using the alternate language of section 35 of the Act. By necessary inference from that instruction the defendant knew the 29 convicted defendants were taking a move and that move would extend to doing other things including the taking and carrying away properties other than just the machine and its related equipment. The evidence of Peter Terry is clear on this point when he said that as soon as the trucks stopped, the men did not just go for the machine but they became disorderly and they rampaged and ransacked the place and properties. Their actions caused the workers and security officers reasonable fear that a breach of peace was being committed.

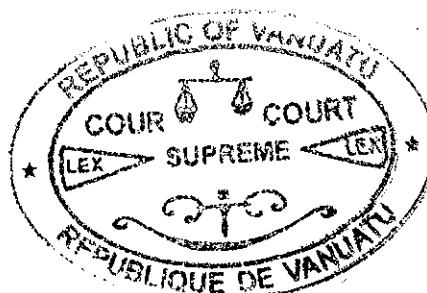


20.11. It is the clear evidence of Godrinton, Patrick, Sean Griffin and Sgt. Jean Baptiste Palo that the defendant remained at the gate to Velit Bay on 21st September 2014 when the group of men he had successfully assembled or encouraged to assemble went down to commit the offences. And he was not merely present and remaining passive. He was showing a document to them which he claimed was a Court Order that authorized him and them to do what they did. Sadly that document was only a Supreme Court Claim which was tendered into evidence as Exhibit P2.

20.12. Clearly the Court was satisfied beyond reasonable doubt that the presence of the defendant at the gate of Velit Bay on 21st September 2014 and his actions in arguing with Will Harvey and Sean Griffin and showing a Supreme Court Claim, using it deceitfully as a Court Order amounted to inciting, supporting and encouraging the commission of offences of theft carried out by the 29 convicted defendants as principal offenders. As such the Court was satisfied that the defendant was guilty of both theft and unlawful assembly as a principal but in the second degree, as an inciter.

20.13. If it was correct that the restraining order- (Exhibit P4) had expired, why did the defendant not go down to Velit Bay with the group and supervise them properly to take and remove only the machine and properties he claimed were his in fact?

20.14. Further if it was correct, that the chain and lock he had requested from Peter Bouchard was to lock up the gate to Stephen Remy's Storage shade, why did Peter Terry not say this in his statement orally or written. Peter Terry was perfectly a reliable witness and it is highly unlikely that he would have omitted to include this evidence about the lock and chain, if he was told it by EM. Further, why did EM prior to going to Kole with Godrinton on 21st September 2014 have to go looking for a chain at Peter Bouchard's compound to take with them to Kole, when the machine would be taken back to town anyway?



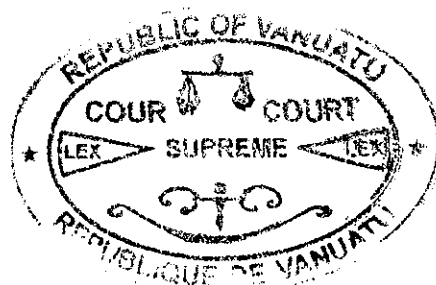
20.15. Further, contrary to what EM said in evidence that his equipment was to be taken to town in Luganville, Peter Terry does say in his statement that EM had told him the machine was to be sent to Malekula. Defence Counsel did not cross-examine the witness about this aspect to disprove its truth.

Credibility of Witnesses

21.1. The defence challenged the inconsistencies of dates appearing in the evidence of Godrinton Lonsdale and Peter Bouchard. Further they challenged the evidence of Fred Nisa as hearsay and Solomon David as irrelevant.

21.2. Firstly I found Godrinton Lonsdale to be hesitant and closed in giving evidence freely. This may have been due to the fact that he is very closely related to the now “defacto wife” of the defendant. Because of that relationship, EM lived with him at the time and for a time only, it seems when all these things were happening. But in general and overall, he was to me a credible witness and I have no reason to label him as an untruthful witness, though he could have revealed even more. Secondly I accept that Peter Bouchard is an old man and dates going back one or two years on could have been due to loss of memory but that did not matter. His relevant evidence were about the defendant’s request for lock and chain, financial assistance and truck use, and a lift to and from Kole. Thirdly Fred Nisa’s evidence was though hearsay substantiated by the fact that he rang Sean Griffin to put him on notice. Had it not been the truth, Fred Nisa could not have rang. And Sean Griffin confirmed that telephone call and the message relayed in his evidence. Fourthly Solomon David’s evidence was relevant.

21.3. Further the defence objected strongly to the prosecution adducing evidence from co-accuseds Peter Servet, Skip Steven Ser, and Renny Samson and Thele Toto. And the Court upheld those objections. But had the Court allowed the prosecutions applications and heard evidence from these other persons, could it have been possible to discredit the defendant’s evidence as to the dates and times of his going to Kole Village from 17-20th September 2014, and further that the purposes of his going there were more extensive than what the



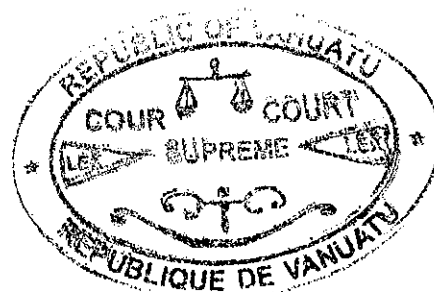
defendant maintained it to be? I am of the firm view that it would. That is the only reason why the defence objected strongly to calling those other persons as witnesses.

21.4. I found the defendant to be an untruthful witness. His demeanour in avoiding to answer very straight forward simple questions put to him either in examination- in- chief or in cross led me to conclude that he was not altogether a truthful and credible witness. For this reason I take caution in accepting the evidence of Stephen Remy. As for the evidence given by Sgt. Afreman Kender, the defendant made a serious mistake to tender the statement of Will Harvey because instead of helping his case, it went against him. He relied only on paragraph 12 of that witness statement as the authority for him to take and remove the machines. That argument is untenable. What Will Harvey said was in no way a permission to the defendant to remove the property as he was not the "owner". And this happened when the intention of the defendant was already being executed by the group of 29 convicted defendants. Further what Will Harvey said happened after he had been seriously assaulted and therefore what he said could not have been said in good faith and with good intentions. It was said as it were under stress, duress and threats, therefore it lacked being a proper and lawful authority.

21.5. The evidence of the other prosecution witnesses were credible but were not directly relevant to the issues of inciting and soliciting the offences of unlawful assembly and theft.

Applying the Law to the Facts

22.1. Section 35 of the Act states that it shall be unlawful to "incite" or "solicit" another person to commit any offence. It is my view that the words "incite" or "solicit" are two and separate words with separate meanings. And they are alternate by the use of the word "or" in between them. If it were not so, Parliament would not have maintained it in the way that it is. Whilst "incite" denotes the mental state and extends to and include instigating or encouraging the commission of an offence, "solicit" denotes the actual prohibited conduct and implies giving help, assistance, support, assistance and advice to the offender directly or



indirectly. Either activity in my view is enough to found liability as secondary party to the commission of an offence.

22.2. Inciting and Soliciting of an offence requires the presence of the person inciting and soliciting at the commission of the offence and the inciter or the aider must be giving active encouragement to the commission of the offence. In the case of Wilcox.v.Jeffrey [1951] 1 All ER 464 the Court held the mere presence alone of the inciter or aider was insufficient to act as an encouragement and that there must on behalf of the secondary party be an intention to encourage, or actually encourage beyond an accidental presence at the scene of the crime.

22.3. In this case the facts revealed through the evidence show it was not by a mere accident that the defendant went to Kole on 21st September 2014. The evidence show he had gone there prior to that date many times beginning on 17th September 2014 and following until 21st September 2014 when it all became reality. Then on 21st September 2014, he started the move. He drove Godrinton's taxi with Godrinton himself first to Peter Bouchard's looking for the chain and lock, then on to Lorum relaying the "message" to the chief's son and then on to Kole. From Kole where he picked up chiefs Paul and Peter, they returned to Velit Bay. At Velit Bay gate Skip Ser and the others went down to the premises. The defendant and chief Peter remained at the gate. He showed them a document which he claimed was a Court order when it was in fact only his Supreme Court Claim. He was actively inciting and soliciting the commission of unlawful assembly and theft as the secondary party. All the two words of inciting and soliciting were used in the charge. Form the evidence adduced by the prosecution I was satisfied beyond reasonable doubt that the evidence had established both concepts, though it would have been sufficient if the evidence had established the defendant's conduct satisfying only one concept.

22.4. In the oral verdicts pronounced on 14th August 2015 I stated the definition of "incite" as given in Black's Law Dictionary, 7th Edition to mean "to provoke or stir up someone to commit a criminal act or the criminal act itself". In addition I posed 5 or more questions which when analyzed with the evidence presented both by the prosecution and the defence



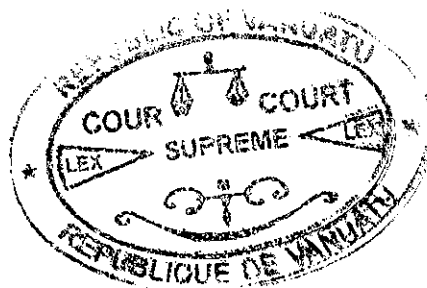
led me to only one conclusion: that the defendant had planned all the meetings had and held from 17th September through to 21st September 2014, and that he had incited instigated or encouraged and solicited by supporting, assisting and helping the commission of unlawful assembly on that date first at Kole, second at the Velit Bay gate and third, down below at the workshop or machine shade. Further I was satisfied beyond reasonable doubt that on the evidence presented by both the prosecution and the defence, that the defendant had incited and solicited the offence of theft carried out by the 29 co-defendants of the oil mill machine and related equipment, and other properties belonging to the management staff of Velit Bay Plantation and Western Pacific Cattle Company.

22.5. In the defendants own evidence on page 16 of this judgment the defendant said that after the meeting with Sen.Insp. Atuary on 17th September had failed and discovering there was no search warrant, he wanted to do things his own way. The reasonable inference from this was that he would take matters into his own hands.

The Result

23.1. For the foregoing reasons I was satisfied the prosecution had discharged the onus of proof placed upon it by section 8 of the Act in relation to both charges of unlawful assembly and theft. Accordingly I returned verdicts of guilty and convictions against the defendant Eilon Mass on 14th August 2015.

23.2. I accepted and agreed with the submissions by Mr Massing but with one qualification to the acting in concert point on which Counsel relied on the case of R.v.Jensen and Ward. I accept that the defendant EM had acted in concert with the other 29 co-defendants in relation only to the other items other than the machines, equipment and items which he claims were his that were taken and removed or carried away by them on 21st September 2014. That is where paragraph 5 (a) of the judgment at page 7 which states the principles of acting in concert were and are relevant and applicable, but I repeat, only in relation to the




theft charge in Count 2. The Jensen/Ward Case differs however on its facts from the present case.

23.3. As for Mr Yawha's arguments and submissions I rejected only those contained at paragraph 17(a), (d), (i), and (j) of this judgment for reasons given.

DATED at Luganville this 18th day of August 2015

BY THE COURT


OLIVER A. SAKSAT

Judge

