

PUBLIC PROSECUTOR

-VS-

NED SIAU LOWE

Coram: Mr. Justice Oliver A. Saksak

Counsel: Simcha Blessing for the State
Robert Sugden for the Accused

Date of Submissions: 24th February 2016

Date of Decision: 25th February 2016

DECISION ON NO-CASE SUBMISSION

Background

1. The defendant is charged with one count of Intentional Homicide contrary to section 106(1) (a) and with one count of Attempt to Destroy Evidence contrary to sections 28 and 78 of the Penal Code Act Cap.135 (the Act).
2. The trial of the Accused commenced on 10th February and continued on 11, 15, 16, 17, 18, 19 and 23 February 2016 with the prosecution calling evidence from 16 witnesses namely: Pauline Kalip, Henry Nupam, Tom Kemua, Tain Nalau, Jenny Tuk, Glenis Robert, Kuatpin Jimmy, Stephen Atnelo, Tyson Nikiau, Corporal John Roal, Jenny Wilson, Wilson Iata, Sargent Teana Pierre Waka, Beden Joseph, Corporal Cooks Thompson and Senior Sargent Olline Vemoli Reuben.
3. At the close of the prosecution case on 23rd February 2016 defence Counsel indicated to the Court that the defence wished to make a no-case submission pursuant to section 135 of the Criminal Procedure Code Act Cap.136. And accordingly written and oral submissions were received on 24th February 2016 from both Counsel. The Court appreciates Counsel for their assistance in providing written submissions. These have been considered and taken into account by the Court.



The Law

4. Section 135 of the Criminal Procedure Code Act [Cap 136] states:

“Acquittal of accused person when no case to answer

If at the close of the evidence in support of the charge, it appears to the Court that a prima facie case is not made out against the accused person so as to require him to make a defence, the Court shall dismiss the case and shall forthwith acquit him.”

5. Section 164 of the Criminal Procedure Code Act states;

“Procedure after close of prosecution

1) *If, when the case for the prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall there upon pronounce a verdict of not guilty.*

2) *In any other case, the Court shall call upon the accused person for his defence and shall comply with the requirements of section 88.”*

6. The relevant case authorities are **Public Prosecutor.v. Samson Kilman & others** [1997] VUSC 21 and **Reg.v.Gailbraith** CA (1981 1 WLR 1039. And the correct test is laid down in **Public Prosecutor .v. Benard** [2006] VUSC 26 which lays down that “ *the test is not proof beyond reasonable doubt but rather as a matter of law whether the accused could be convicted on the evidence presented thus far.*”

Discussions

7. Applying the law to the evidence presented or produced thus far, has the prosecution established that-
- a) The accused committed an unlawful act on Roger Kamisak (the deceased)?
 - b) The unlawful act caused the death of the deceased?
 - c) The accused intended to cause the death of the deceased?

The answers to these are in the negative. This is in relation to the Intentional Homicide charge.



8. In relation to the Attempt to Destroy Evidence charge, on the evidence produced thus far, has the prosecution established that-

- a) The accused attempted to remove or destroy evidence on and in the vehicle?
- b) The accused know the evidence and in the vehicle could or would be used as evidence?
- c) The accused attempted to remove or destroy the evidence with intent to prevent it from being used in evidence against him?

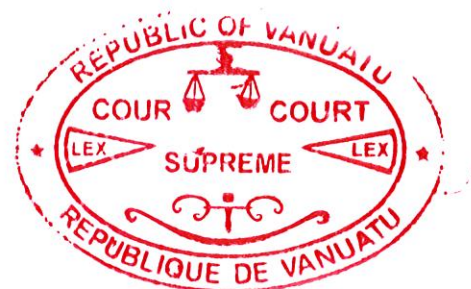
The answers to these are in the negative.

9. The Court finds there to be some evidence but due to its weakness, vagueness and inconsistencies, the Court or a jury properly directed could not properly and safely convict the accused on it. There is no direct evidence but merely circumstantial evidence which need or lack substantial corroboration.

10. Further, there are flaws in the prosecution case in that-

- a) The knife was not identified and produced in Court.
- b) The broken pieces of glass were not identified and produced
- c) The photographs were not identified in Court
- d) There was no autopsy report.
- e) There was no Report by Inspector Rex lodged in accordance with section 224 (1) of the Criminal Procedure Code Act.
- f) There was no finger printing
- g) There was no blood analysis by a pathologist.
- h) There were no Note Books produced by the Police Officer involved.

Excluding all these evidence, what remains is weak, vague and contain inconsistencies.



Conclusion

11. For the foregoing reasons, I conclude that the prosecution has not established a prima facie case against the accused. Accordingly I pronounce the accused not guilty and acquit him of both charges.

DATED at Port Vila this 25th day of February 2016

BY THE COURT


OLIVER.A.SAKSAK

Judge

