

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal
Case No. 20/3456 SC/CRML

BETWEEN: Public Prosecutor

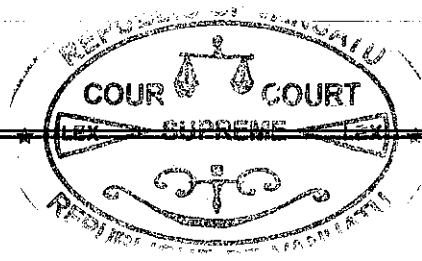
AND: 1. Emil Jacob
2. Brian Jacob
3. Kambol Magreveth
4. Tino Gavick
5. David Nono
6. Cliff Tula

Date: 22nd April 2021
By: Justice G.A. Andrée Wiltens
Counsel: Mr D Boe for the Public Prosecutor
Mr T J Botleng for the 1st, 2nd, 3rd and 4th Defendants
Mr J Garae for 5th and 6th Defendants

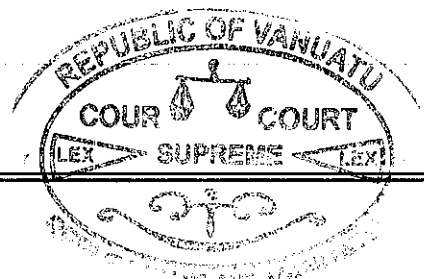
DECISION ON NO CASE TO ANSWER

A. Brief Summary of the evidence

1. Mr Vira Leo
 - witnessed the event
 - scared
 - 17 June 2020 11pm
 - assault by Kambol, Cliff, David, Tino and 2 other
 - dragged deceased to Cliff's house
 - dragged deceased down to the river
 - sent Kambol to get rope/tarpaulin
 - 18 June 2020 2am
 - put deceased on tarpaulin and cover him up
 - returned to the road. Emil, Kambol, Tino and 2 others
 - Cliff and David came back to the road
 - 5am
 - Next day Cliff told VL not to tell about drinking
 - They made a plan. Told VL not to tell anyone they had killed Christian. If VL did, he would die.



2. Morise John – drinking with some of the defendants in the afternoon.
3. Kami Mida – Chief
 - 18 June 2020 2am sleeping. Hears noise: Kambol and another
 - Kambol said "I came to hide a boy from the West Coast because Brian and Emil were hitting him, punching him." He asked Kami to call the police.
4. Sam Wilsanto – drinking with some of the defendants in the afternoon.
5. Ben Lui – heard a voice at 3am on 18 June 2020 – Kambol
 - "Daddy Kami, come and see Brian and Emil are assaulting a student who lives at Chapet's house.
6. Jefften Aru – In July 2020, on the way to wedding Tino was drunk.
 - When told to be quiet he retaliated – "you will be floated like the one who was floated on the river"
7. Sandrino Tabi - In July 2020 on the way to the wedding, Tino said: "Don't make me float you on the river like the boy who floated on the river."
 - Everyone was drunk and took no notice
8. Harold Noko – drinking with some defendants in the afternoon of 17 and 18 June 2020.
9. Lyn Noel – went to Kwantas on 21st June 20 at the request of Chief to find Brian, Emil and Kambol after reading on face book about death.
 - He heard Kambol say "When the President signs, fasten the rope around the neck, down Sarakata River. Who will know about that."
 - Effected citizen's arrest of Brian and Kambol.
10. Robert James – went with Lyn. Overheard Kambol's statement.
 - Pathologist report – Ex 3 Death caused by drowning.
Significant contribution was subdermal haematoma at the back of the head – blunt force injury
 - David Nono interview: Ex1: Agrees that after Cliff assaulted Christian, he took away Christian's phone. He saw the phone again at Cliff's house in July.
 - Statement of Rebecca Alivet – On 17 June 2020 at 10pm she heard some young boys on the road by her house in Pepsi. They were drunk and shouting. One person cried out 2 times to his mother.
 - Admitted Facts – Christian phone seized by police from Cliff's house in July
 - Rope and tarpaulin found at Kambol's home in July



B. Assessment of Evidence

1. I can ignore the evidence of : Morise John
Sam Wilsanto
Harold Nako

This evidence does not assist in establishing who took part in the assault/drowning.

2. Vira Leo told us what had occurred on 17 and 18 June 2020. I accept his version of the drinking, the argument, the assault, the calling out by Christian to his mother, hiding he body, and eventually the disposal of the body in the river.

- However, at the time Vanuatu had a curfew as part of the Covid-19 lockdown. Almost everything was shut up by 9pm, and most people were in their homes. It was dark that night – so dark Vira Leo could not see what he alleges with certainty.

- Hi evidence is that he was, at all times, standing close by, observing. However Christian was his nephew. He is 16 years old. He was apparently being assaulted by a group of older males and calling out to his mother for help. Yet Vira Leo did not a thing to help his relative. And, he remained with the group for 5 hours, all the while being scared to leave.

- Vira Leo's evidence is unreliable and inconsistent. I cannot place weight on his evidence because of that. Further, he has a reason to come to Court to not tell the truth if he was involved as one of the perpetrators. He admits being present throughout. I am not prepared to believe his allegations as to who did what to Christian.

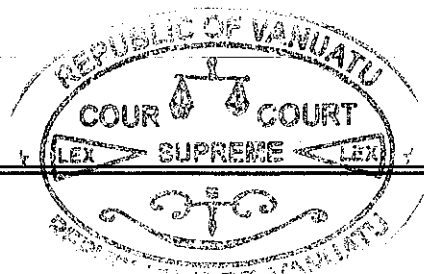
- It is unusual to consider what weight to give to a witness' account at this early stage of a criminal trial. That is usually left until the conclusion of all the evidence.

- However, as explained by the Court of Appeal in PP v. Suaki [2018] VUCA 23,

Credibility may be taken into account "where the evidence adduced in support of the prosecution's case has been so discredited.....or so contradicting, or it is so manifestly unreliable that no reasonable tribunal..might safely convict upon it."

- That is the position in relation to Mr Vira Leo.

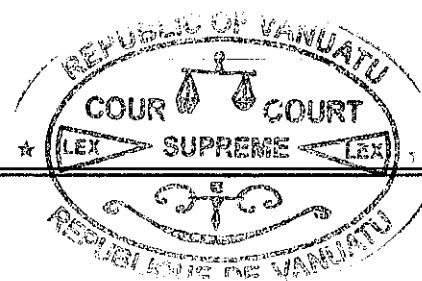
3. Chief Kami Mida reported a conversation at 2am on 18 June 2020 with Kambol. Kambol told him he came to hide a boy being assaulted. His statement that Brian and Emil were the assailants is inadmissible as against those defendants. Importantly, the Chief related to Kambol asked him to ring the police. That is not the action of a criminal.
4. Ben Lui heard Kambol calling out at 3am on 18 June 2020. What he heard was Kambol telling Kami that Brian and Emil were assaulting a student who resided at Chapel's house. Again, Kambol's statement that Brian and Emil were the assailants is inadmissible as against them.



5. Jeffen Aru and Sandrino Tabi told the Court about the family journey to a wedding in July 2020. The males then present had been drinking and were under the influence of alcohol. Tino was being objectionable and was told to stop shouting at the people on the road. He responded by saying "Don't make me float you on the river like the boy was floated down the river."
 - On one view the statement could be seen as incriminating. However the Court is aware from Lyn Noel that there was much chatter on facebook about this unfortunate incident on 18 June 2020 and it was widely publicised thereafter. Given the knowledge within the community, the sinister inference of Tino's peculiar knowledge of the event can be put aside.
 - Even if I accept that Tino said these words, that does not advanced the prosecution case.
6. Lyn Noel and Robert James essentially effected citizens arrests of Brian and Kambol at the request of their chief. While so engaged, they heard Kambol say "When the President signs, fasten the robe around the neck, down to the Sarakata River, who will know about that?"
 - Even if I accept they overheard Kambol saying those words, I not do consider they are incriminating. That is because there are other innocent explanations for what the words mean. I can only interpret the words in a manner adverse to the defendants if that is the only available interpretation.
7. The "admission" by David in his police evidence is not admissible evidence against Cliff. It is however evidence of David's presence during the assault. That of course is insufficien to support a conviction as there is no evidence of David's participation.
8. Rebecca Alivet confirms that Christian called out twice to his mother while being assaulted. If I accept that this confirms what Vira Leo said. However that does not advance the prosecution.
9. The post mortem report confirms that Christian was assaulted and that he died of drowning.

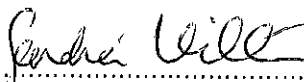
C. Decision

10. The prosecution evidence as to who participated in the assault comes solely from Vira Leo. I do not accept him as a credible or reliable witness. Similarly, there is no acceptable evidence as to who was involved in drowning Christian.
11. The attempt by the prosecution to rely on circumstantial evidence is insufficient to establish a prima facie case. Even when considering all the evidence on a global basis I do not consider any of the defendants has a case to answer.
12. I have considered whether the charges could be amended to fit the facts, by lowering the culpability. I have concluded that would not assist the prosecution.



13. In the circumstances, all 6 defendants have no case to answer on charge 1 and charge 2 and are acquitted.

Dated at Luganville, this 22nd day of April 2021
BY THE COURT


Justice G.A. Andree Wiltens

