

BETWEEN: Public Prosecutor

**AND: Charley Naus, Jimmy Iaruel, Andrew Iawa, Harry Kausir Junior,
Lokanau Ialulu, Nangiatis Nakou, Lalbun Naus, Allan Charlie, Joe
Charlie**

Defendants

Dates of Hearing: 23, 24, and 25th April 2024

Date of Oral Verdict: 25th April 2024

Date of Written Verdict: 26th April 2024

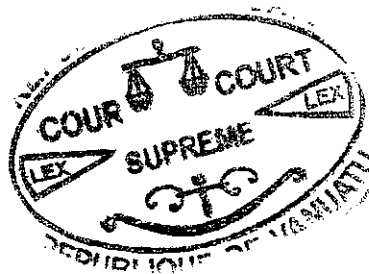
Before: Justice Oliver A Saksak

**Counsel: Ms Florence Sewen for Public Prosecutor
Mrs Meresimani Markward for the Defendants**

JUDGMENT

Introduction

1. By an Amended Information filed on 23rd April 2024 Prosecution charged the 9 defendants as follows:-
 - Count 1- Criminal Trespass, section 144 (a) PCA against Charley Naus
 - Count 2- Criminal Trespass, Section 144 (a) PCA against Jimmy Iaruel
 - Count 3- Criminal Trespass, 144 (a) PCA against Charlie Naus and Jimmy Iaruel.
 - Count 4- Criminal Trespass, section 144 (a) PCA against Charlie Naus and Jimmy Iaruel.
 - Count 5- Threats to kill, section 115 PCA against Charlie Naus
 - Count 6- Criminal Trespass, section 144 (a) PCA against Andrew Iawa, Harry Kausir, Junior, Lokanau Ialulu, and Nangiatis Nakou.
 - Count 7- Threatening Language, section 114A PCA against Andrew Iawa.
 - Count 8- Inciting and Soliciting Intentional Assault, section 35 and 107 (b) PCA against Andrew Iawa.
 - Count 9- Threatening Language, section 114 A PCA against Andrew Iawa, Harry Kausir, Junior Lokanau Ialulu and Nangiatis Nakou, and
 - Count 10- Unlawful Assembly, sections 68 and 69 (1) PCA against Jimmy Iaruel, Harry Kausir Junior, Lalbun Naus, Allan Charlie and Joe Charley.

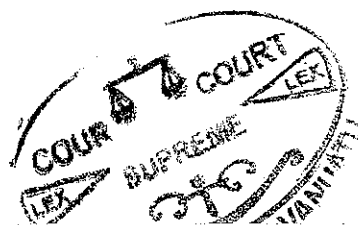


Facts

2. It was alleged by Prosecution that-
 - a) On 19th February 2023 Charley Naus at Ienumta, Village, Bethel entered Tom Kalip Neman's property with intent to intimidate, insult or annoy him. (Count 1).
 - b) At 3pm on 19th February 2023 Jimmy Iaruel at Ienumta village Bethel entered Tom Kalip Neman's property with intent to intimidate, insult or annoy him (Count 2).
 - c) On 22nd February 2023 at Ienumta Village, Bethel Charlie Naus and Jimmy Iaruel entered the property of Tom Kalip Neman and intimidated, insulted and annoyed him (Count 4).
 - d) On 1st of April 2023 at Ienumta Village, Bethel Charlie Naus threatened Peter Iaruel Neman to kill him along with his wife and children (Count 5).
 - e) On 21st July 2023 at Ienumta Village Bethel, Andrew Iawa, Harry Kausir Junior, Lokanau Ialulu and Nangaitis Nakou entered the properties of Tom Kalip Neman, Josina Iaruel, Nasuel Iaruel, Iawilim Kapalu and Nakou Serah with intent and intimidated, insulted and annoyed them (Count 6).
 - f) On 21st July 2023 at Ienumta Village, Bethel Andrew Iawa, Harry Kausir Junior, Lokanau Ialulu and Nangaitis threatened Josina Iaruel by warning them not to remove coconuts or else they would kill those responsible, that the boys would go and get benzine and return to burn their houses, and that she and her family should leave by evening, if not they would return and burn their houses and kill all of them (Count 7).
 - g) On 23rd July 2023 at Ienumta Village Bethel, Andrew Iawa incited Harry Kausir Junior, Lokanau Ialulu and Nangaitis Nakou to assault Tom Kalip Neman, Peter Iaruel, Neman, Micheal Iasuel, Reni Nukwen and Lomai Sapa and consenting to them to assault by saying " Ok kilim olgeta" Count 8.
 - h) On 23rd July 2023 at Iakulpau, Andrew Iawa, Harry Kausir Junior, Lokanau Ialulu and Nangaitis Nakou used threatening gestures against Tom Kalip Neman, Peter Iaruel Neman, Michael Iesil , Reni Nukwei and Lomai Sapa and chasing after them, armed with bush knives and axes. (Count 9).
 - i) On 24th July 2023 at Bethel Village, Jimmy Iaruel, Harry Kausir Junior, Ialibun Naus, Allan Charlie, and Joe Charley assembled together with intent and intimidated, insulted and annoyed the people of Bethel village causing them to fear for their lives.

Pleas and Defence

3. The defendants denied all charges and entered pleas of not guilty respectively.



4. Their defence was that they did not intend to commit the offences charged against them and contended that they acted in accordance with the order of the nakamal.

Burden and Standard of Proof

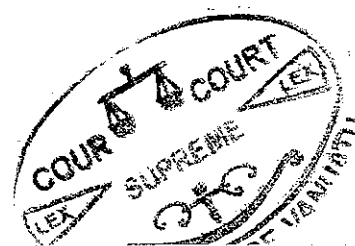
5. Prosecutions had the burden of proof on the standard of proof beyond reasonable doubt pursuant to section 8 of the Penal Code Act and section 81 of the Criminal Procedure Code Act [Cap 136] which was read to the defendants and explained in Bislama.

Prosecution Evidence

6. Prosecutions called 9 witnesses to give oral evidence from Tom Kalip Neman, Peter Iaruel Neman, Donald Gideon, Josina Iaruel, Nasuel Iaruel, lawilim Kapalu, Nakou Serah, Lonbil Iaruel, and Reni Nukwei who were cross-examined, by defence counsel.
7. Further, by consent the Prosecutor and defence counsel agreed for the statements of Police offices be admitted into evidence without cross-examination. These were statements from officer Christopher Marango (Exhibit P1), Officer Lindsay Shem (Exhibit P2), Officer Jessica Kalkoa (Exhibit P3), Officer Dalsie Iaman (Exhibit P4), Officer Sosoh Apeth (Exhibit P5) and Officer Jeddy Taravaki (Exhibit P6) and the Crime Scene Album (Exhibit P7).

No Prima Facie case Established

8. Prosecutions closed its case at the end of all the evidence of the witnesses. Defence counsel did not make any application for a no-case submission. The Court made its ruling under section 135 of the Criminal Procedure Code Act on its own motion.
9. Section 135 states:
"135. 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."
10. Applying section 135 of the Act, I ruled that Prosecutions had not established any prima facie case against the accuseds Charley Naus and Jimmy Iaruel and acquitted them of the charges of Criminal Trespass in Counts 1, 2, 3 and 4. I also acquitted Charley Naus in relation to the charge of threats to kill in Count 5.
11. In relation to Criminal Trespass laid under section 144 (a) PC Act (counts 1, 2, 3 and 4), Prosecutions had to show-
 - a) That Charley and Jimmy entered upon the property of Tom Kalip Neman and Peter Iaruel Neman,
 - b) That they did so with intent to intimidate, insult or annoy them, and
 - c) That Tom Kalip and Peter Iaruel were in lawful possession.



12. And in relation to threats to kill laid under section 115 of the PC Act, Prosecutions had to show-
 - a) That Charley made oral threats to Peter Iaruel Neman, his wife and children.
 - b) That the threats were direct or indirect, and
 - c) That he knew of the contents of the oral threats made.
13. Tom Kalip Neman and Peter Iaruel Neman gave oral evidence in relation to Criminal Trespass in Count 1, 2, 3, and 4 and the charge of threats to kill in Count 5.
14. Tom Kalip's evidence show that on 19 and 21 February 2023 Charley Naus and Jimmy Iaruel had gone to his house and told them to stop building Peter's house because the timber used were cut out of their land. During the second visit on 21st February 2023 when they made a joint visit, they reminded the complainants about complying with the order given by the Nakamal. They told them that if they did not comply, another action would be taken.
15. It was Tom Kalips evidence also that on 22nd February 2023 he took his wife and children and went to his mother in law's house.
16. Peter Iaruel's evidence confirmed what his brother Tom said in evidence about what occurred on 19th and 21st February 2023. However his evidence in regard to the threats to kill him, his wife and children made on 1st April 2023 was that Charley met him on the road and told him that a meeting was called in the nakamal but he was not present. He did not give any evidence showing that threats were made by Charley to kill him, his wife and children.

Findings

17. There was no evidence showing that Tom Kalip and Peter Iaruel are in lawful possession of the land they were occupying at the time. The words said by Charley or Jimmy on 19th and 21st February 2023 were not such as to intimidate, insult or annoy, rather they were instructions and reminders to leave the land.
18. It therefore appeared to me that there was no prima facie case made out against Charley and Jimmy to require them to put up a defence in relation to the charges of criminal trespass in Counts 1, 2, 3 and 4 and to the charge of threats to kill in Count 5.

Result

19. Accordingly I acquitted them both of those charges.
20. I however ruled that Prosecution had established prima facie case against Andrew Iawa, Harry Kausir, Junior, Lokanau Ialulu and Nangaitis Nakou in relation to the charges in Counts 6, 7, 8, 9 and 10. The charge of unlawful entry in Count 10 also included Jimmy Iaruel, Harry Kausir, Junior, Lalbun Naus, Allan Charlie and Joe Charley.

The Defence case

21. The Court required the remaining defendants to give evidence in their defence.



22. Section 88 of the CPC Act [Cap 136] was read and explained in Bislama. Defence Counsel indicated the defendant would give evidence themselves and would call alibi evidence from six other witnesses.
23. The defendants Andrew Iawa, Harry Kausir Junior, Lokanau Ialulu, Nangiatis, Allan Charlie and Jimmy Iaruel gave evidence in their defence. Only Joe Charley was not called to give evidence.
24. The defendants gave evidence in their alibi from Lalbun Allan, Willie Nataka, Peter Nahusen, Silvie Kalua and Harry Kausir Senior.

Final Addresses and submissions

25. I heard oral summaries, addresses and submissions from both Mrs Sewen and Mrs Markward. The Court appreciated the helpful and abled summaries and submissions from counsel made in a very short space of time after trial yesterday (24/04/2024).
26. After summarizing the evidence by Prosecution witnesses. Mrs Sewen acknowledged that Prosecutions had not discharged its burden of proof to the required standard against Andrew Iawa in relation to the inciting and soliciting charge in Count 8 and the threatening language charge in Count 9 against Andrew Iawa, Harry Kausiri Junior, Lokanau Ialulu and Nangiatis Nakou. Further Prosecutions also acknowledged they had not discharged their burden of proof against Allan Charlie in relation to the charge of Unlawful Assembly in Count 10.
27. With respect to the remaining charges in Counts 6, 7 and 10 Prosecution submitted that relying on the evidence of Donald Gideon, Josina Iaruel, Nasual Iaruel, lawilum Kapalu, Nakou Serah, Lonbil Iaruel, and Reni Nukwei and the defendants' evidence from Andrew Iawa, Lalbun Naus, Jimmy Iaruel and Sylvie (Amos) Kalua that the Court should be satisfied beyond reasonable doubt that all the elements of the charges in Counts 6, 7 and 10 were proved.
28. Mrs Markward on the other hand submitted that Prosecutions had not discharged its legal and evidential burden of proof of the defendants guilt and should return verdicts of not guilty and acquit all the defendants.

Discussion

29. I accepted the Prosecutions submissions and rejected the defence submissions. The evidence of Josina, Nasual, lawilum, Serah and Lonbil clearly established that defendants Andrew Iawa, Harry Kausir Junior, Lokanau and Nangiatis had gone onto their properties without any claims of right and threatened them to leave the property or they would return and burn their houses and kill them. From their evidence I was satisfied beyond reasonable doubt that the named defendants were guilty of criminal trespass in Count 6 and of threatening language in Count 7.



30. In regards to the unlawful assembly charge in count 10, I was satisfied from the evidence of Donald Gideon as confirmed by the evidence of the defendants Andrew, Jimmy, Lalbun and Sylvie that the people who had gathered together and went over to Bethel Village, on 23rd July 2023 was a bigger number but only four (4) defendants were identified. These were Jimmy, Harry Kausir Junior, Lalbun Naus and Joe Charley. Defendant Lalbun Naus confirmed this in his evidence for the defence.
31. It was the defendants' evidence that they went to Bethel to pass on the minutes of the Nakamal Meeting to Amos. Those minutes were not produced by the defendants. Amos did not give evidence. The defendants did not give evidence of what date the Nakamal sat to make the decision the defendants claimed they acted upon to go onto the complainant's property. None of the chiefs who sat on what the defendants called " Supreme Nakamal" was called to confirm their assertion.
32. The defendants said they went to Bethel quietly because there was a death in the village and that they had no intention to cause fear to the people of Bethel. And they denied threatening any women on 21st July 2023 when they went onto their property and planted coconuts, bananas, taro and kava.
33. If what the defendants asserted was true, I ask the questions, why did the Police go up to Amos's house at Bethel on 24th July 2024 when the group including the named defendants went there? Further why did Josina and her children and the other women call for a truck to come and take them out of their property and homes on 21st July 2023? And further why have the complainants still not permitted to return to their homes?
34. The only possible inference to be drawn is that the defendants had threatened the complainants and caused them to fear for their lives and safety by their knives and spades and the forceful actions of planting crops over the land which they had lived their lives overtime.

Findings

35. I find no evidence from the defendants consistent with innocence in relation to the charges in Counts 6, 7, and 10. Defence Counsel made reference to the Court of Appeal case of Goroka v PP [2007] VUCA 3 in which the Court of Appel laid down the principles and standard of proof beyond reasonable doubt where defendants present evidence in their defence giving explanations and alterative versions which could reasonably be true. Regrettably that case does not assist the defendants in regard to the charges in Count 6, 7, and 10. Nothing said by way of explanations or as alternative version by the defendants as witnesses could be reasonably true in light of the questions posed in paragraph 33 of this judgment.
36. Further defence counsel referred to the case of PP v Kaper [2018] VUSC 169 where 31 defendants were charged with similar offences as the defendants in this case where the defendants relied on the orders of a nakamal.
37. Section 22 of the PC Act [Cap 135] is clear that " [No]" responsibility shall attach to an act performed on the orders of a superior to whom obedience is lawfully due..."



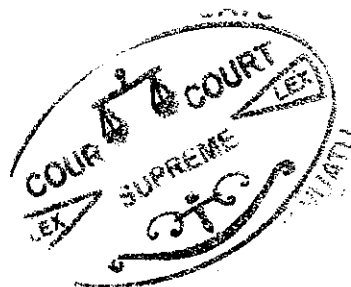
First, the person relying on superior orders must show that such order exists, and the person in the superior position who made it. The defendants have not done that. Section 22 of the PC Act did not and does not give any protection and defence to them.

Second, the superior order must be a lawful order and not an unlawful one or one requiring the person executing it to do an unlawful act. In this case the defendants acted on an order that permitted them to enter into properties occupied by other persons without permission, with knives and spades and planting on the land. Clearly if there was such an order, it was not a lawful order as required by section 22 of the PC Act. Before executing such orders good and moral conscience must dictate and demand that executors of such orders, must stop and think before "leaping" as the consequences of the actions that may result and flow from their actions will be grave and serious. In this case it is obvious none of that occurred. Section 22 could not and should not be used in the circumstances of these defendants and/or any similar circumstances.

38. Here, it was asserted the orders were given by a Supreme nakamal. Under the custom Land Management Act, Nakamals have a responsibility of determining land disputes. But the Act provides for clear procedures to be followed before meetings can be held to make the meetings and the decisions made in those meetings lawful and legally binding and enforceable. In this case there was nothing in the defendants' version that showed the procedures under the Act were adhered to and respected.
39. The defendants' version could therefore not possibly be true and the case of Kaper does not assist them. Indeed that case is directly against the defendants.

Verdicts

40. Having analyzed the evidence I was satisfied that Prosecutions had proved the defendant's guilt beyond reasonable doubt and returned the following verdicts-
- a) In relation to criminal trespass – count 6 against Andrew Iawa, Harry Kausir Junior, Lokanau Ialulu and Nangiatis Nakou, I returned verdicts of guilty on each of them as charged and entered convictions accordingly.
 - b) In relation to threatening language – count 7 against Andrew Iawa I returned the verdict of guilty and convict him accordingly.
 - c) In relation to inciting and soliciting- count 8 against Andrew Iawa, I returned the verdict of not-guilty and acquitted him accordingly of the charge.
 - d) In relation to threatening language in count 9, I returned verdicts of not guilty against Andrew Iawa, Harry Kausir Junior, Lokanau Ialulu and Nangiatis Nakou and acquitted them accordingly of the charge.



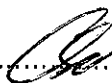
- e) In relation to unlawful assembly in Count 10, I returned verdicts of guilty on Jimmy Iaruel, Harry Kausir Junior, Lalbun Naus and Joe Charley and convict them accordingly. I returned a verdict of not guilty against Allan Charlie and acquitted him of the charge.

Sentence

41. I adjourned sentence to Tuesday 30th April 2024 at 9:00am and directed that-

- a) Probation Service submit a pre-sentence (Same day) Report by 11:00am on Friday 26th April 2024.
- b) Prosecution submissions on sentence to be filed and served by 4:00pm on 26th April 2024.
- c) Defence submissions to be filed and served by 11:00am on Monday 29th April 2024.

**DATED at Isangel this 26th day of April 2024
BY THE COURT**


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**Hon. Oliver A Saksak
Judge**

