

IN THE SUPREME COURT
REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No. 197 of 2014

PUBLIC PROSECUTOR

-v-

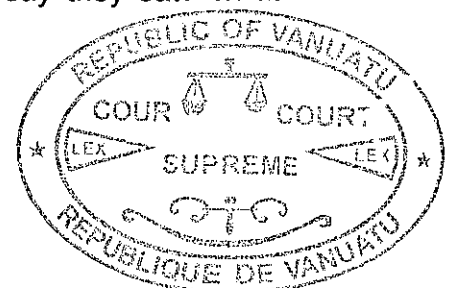
CHARLEY YUNDEN

Before: Chetwynd J
Hearing: 25th, 26th, 27th, and 30th May 2016

Mr Blessing for the Public Prosecutor
Mr Vira for the Defendant

Verdict

1. Charley Yunden is charged pursuant to section 106(1)(b) of the Penal Code in that he intentionally caused the death of Lily Kom and that the act was premeditated.
2. I have heard evidence from various people about the events leading to Lily's death but there is no direct evidence of what happened. What we know for sure from the medical reports is that Lily Kom died on 24th October 2014 as a result of at least three blows to her body with a sharp edged object An axe was found close to where Lily's body was discovered but apart from the finding of blood and hair on it there is nothing to directly link it with Lily's death. Apparently there is no facility in Vanuatu able to provide DNA testing. There is no doubt the experience in other jurisdictions is that DNA testing is an extremely reliable and valuable investigative tool. One can only hope the new Police Commissioner will give some thought to finding a way to make DNA testing available in Vanuatu. It is expensive but the certainty of proof it provides would lessen the time spent in contested trials.
3. The Defendant has made admissions about the events of that day. During an interview under caution he told the investigating officer he and Lily were together in the morning. They had a meal together and afterwards they were talking. He said he became cross and he lost control.
4. The next thing he remembers is holding an axe. There was blood on the axe and his clothes. He says he realised he must have done something wrong so threw the axe down and ran away. During the interview he acknowledged the relationship between him and Lily was troubled because of her infidelity.
5. The burden of proof in this case is on the prosecution. The prosecution must prove beyond reasonable doubt the Defendant killed Lily, that he intended to kill her and that the act which resulted in death was premeditated. As mentioned earlier there is no direct evidence of how Lily died. None one has come forward to say they saw what



happened. However inferences can be drawn from other evidence before the court and those inferences can found a conviction. In *Swanson v PP*¹ the Court of Appeal discussed inferences:-

"This was a case where the prosecution was based wholly in circumstantial evidence. The Judge correctly acknowledged that the accused could be convicted only if guilt is the only reasonable inference open on the facts. In argument, counsel suggested many suggestions of inferences which, in his submission could have been drawn by the Judge - inferences consistent with innocence. One example of his suggestions will suffice. Counsel suggested that when the appellant asked Mr. Ngwele for the 'Bank Keys' the appellant was only 'big noting'. We regard that as an unlikely inference, far outweighed by the inference of dishonesty.

Inferences may be drawn from proved facts if they follow logically from them. If they do not, then the drawing of any conclusion is speculation not proof. Speculation in aid of an accused is no more permissible than speculation in aid of the prosecution. (R. v. Harbour, [1995]1 NZLR 440.

Inferences need not to be irresistible. The prosecution is not required to disprove any inference that the ingenuity of counsel might devise. It must exclude any reasonable hypothesis based on the evidence which is consistent with innocence, but no more. R. v. Laugalis (1993) 10 CRNZ 350, 359. To similar effect is Section 8 (1) of the Penal Code Act [CAP 135] which mandates proof beyond reasonable doubt but states that "the determination of proof beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous".

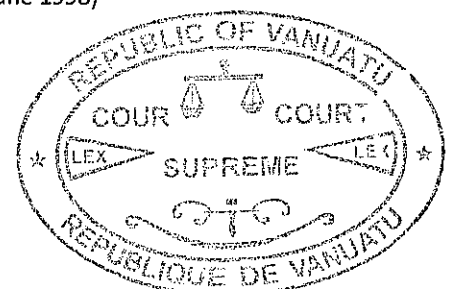
In the slightly earlier case of *Sokomanu v PP*² the Appeal Court said:

"Where the issue is whether a particular inference can be drawn from proved facts, it is helpful to refer to the judgment of the High Court of Australia in Barca v The Queen: [1975] HCA 42; (1974) 133 C.L.R. 82 (at p. 104):

"When the case against an accused person rests substantially on circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused. To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be the only rational inference that the circumstances would enable them to draw"

¹ *Swanson v Public Prosecutor* [1998] VUCA 9; Criminal Appeal Case 06 & 11 of 1997 (26 June 1998)

² *Sokomanu v Public Prosecutor* [1989] VUCA 3; [1980-1994] Van LR 440 (14 April 1989)



6. The evidence of what the Defendant told the police under caution was challenged. In support of a *voir dire* the Defendant indicated there were allegations of violence and beatings and the violence was the only reason he said what he said. However, during the *voir dire* the allegations of violence and threats were not pursued. Instead it was said the Defendant had been subjected to inhuman treatment by being stripped and made to sleep on the floor naked. The Defendant's evidence on that question lacked any credibility. The degradation was said to have happened on arrest not just before the interview which took place some days after the arrest. What the objection boiled down to in the end was the Defendant had been taken from the Correctional Services Centre and questioned. Whilst that may not have been entirely acceptable the Defendant did not say he only told the officers what he did because he was interviewed in that manner. All he said was he should not have been taken from the Correctional Services Centre. My finding at the conclusion of the *voir dire* was that the statement under caution was admissible as evidence.

7. The Defendant's admissions in the interview under caution are circumstantial as to the exact events that morning. However, taken with the other evidence before the Court in the form of oral evidence, tendered statements and reports, the only logical inference can be that the defendant assaulted Lily Kom with an axe. He did so in a fit of rage. The Medical evidence shows that Lily was almost decapitated and her brain stem was severed. There were other injuries and the severing of her finger indicates she even tried to defend herself. The nature of the injuries were such, they could not be the result of just an assault. They resulted from a savage attack on Lily, an attack which was meant to kill her. The injuries were of such severity the only logical inference is that someone was trying to kill her. What the evidence, including that from the Defendant, cannot show and what cannot be inferred is that the attack was planned. On the contrary, the evidence points to someone in a sudden and blind rage striking blow after blow and then fleeing the scene.

8. I am satisfied beyond reasonable doubt the Defendant intentionally caused the death of Lily Kom by striking her several times with an axe. I cannot be sure that the attack was premeditated. As I cannot be sure the attack was premeditated the Defendant cannot be convicted of an offence under section 106(1)(b) of the Penal Code. However, the Defendant is guilty of an offence under section 106(1)(a) of the Penal Code. He is convicted of the intentional homicide of Lily Kom on 24th October 2014.

9. The case is adjourned for reports and sentence to 9 am on 11th August 2016.

Dated 4th July 2016 at Port Vila.

