

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

Criminal
Case No. 17/1541 SC/CRML

BETWEEN: Public Prosecutor

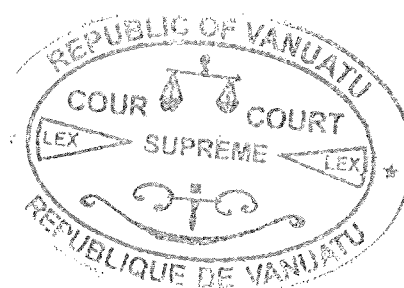
AND: Kiki Colmar
Graham Hack
Defendants

Date: 23 November 2018
By: Justice G.A. Andrée Wiltens
Counsel: Mr R. Sugden for the Public Prosecutor
Mr N. Morrison for the First Defendant
Mr S. Hakwa for the Second Defendant

VERDICT

A. Introduction

1. A prominent Luganville business was shot at in the early hours of 16 December 2013. Even though the shot was taken from point blank range, it missed the intended victim completely. The person who fired the shot has been tried and convicted.
2. These defendants are charged with instigating the attack in return for a promised payment to the gunman of VT 3 million each. Both defendants deny the allegations.



B. The Charges

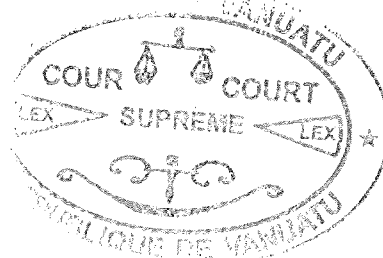
3. The first charge alleges that the defendants solicited attempted intentional premeditated homicide. The second charge alleges that the defendants aided counseled or procured attempted intentional unpremeditated homicide.
4. The legal ingredients that are inherent in the two charges differ.
5. For soliciting attempted premeditated homicide four things need to be established, namely that each defendant (i) solicited (ii) a planned and (iii) intentional (iv) attempted killing.
6. For aiding, counseling or procuring attempted intentional unpremeditated homicide three things need to be established, namely that each defendant (i) aided, counseled or procured (ii) an intentional (iii) attempted killing.
7. To solicit, in law, is "to encourage or endeavour to persuade".
8. To aid, in law, is "to give help, support or assistance".
9. To counsel, in law, is "to advise or solicit".
10. To procure, in law, is "to produce by endeavour".
11. Although it can immediately be seen that is a great deal of similarity between the charges, they are distinct and quite separate allegations. Effectively this has been 4 separate trials all run together.

C. Onus and Burden of Proof

12. The prosecution has the burden of proving each of the charges against each of the defendants. The defendants have no onus of proving anything – each is considered innocent unless it is proved otherwise.
13. The prosecution must prove each of the legal ingredients that make up the charges against each of the defendants to the criminal standard of proof, namely beyond reasonable doubt. In other words, I need to be sure that every ingredient has been proved before I can convict either defendant of either charge.

D. Witness Assessment

14. It is natural to think that one can tell when someone is telling the truth or otherwise. However, such things as body language and witness demeanour are a poor method to ascertain witness accuracy

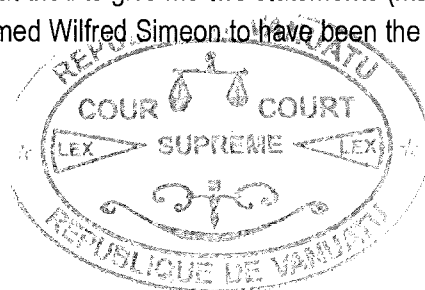


and reliability. A better way of undertaking the task is to focus on consistency. It is more likely a witness is telling the truth if he/she is consistent within their evidence, consistent with previous accounts they have provided, consistent with other witnesses accounts, if their evidence fits in with proved other facts and exhibits, and if it is inherently credible as something most people would accept. I applied those parameters to all of the witnesses who gave evidence in this trial in assessing whether it was safe to rely on what he/she said.

15. I reminded myself, that as the fact-finder I was entitled to accept some of what a witness had said, all of what a witness had said, or none of what the witness told me – depending on how I assessed that particular person. The question of what weight to attach to any proven facts was also entirely within my province.
16. As well as what the witnesses told me, I also reminded myself that inferences could be drawn to widen the scope of the evidence to be considered. There are 2 constraints to that. Firstly an inference cannot be a guess or speculation. It must be something that can readily be inferred from other proven facts. Secondly, an adverse inference can only be drawn if it is the only available inference. Where there is more than one inference available, the inference most favourable to the defendant must be drawn.

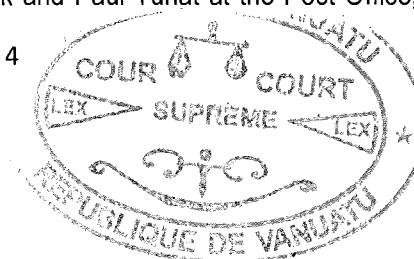
E. Evaluation of the Relevant Evidence

17. Paul Tunat told me he had shot at John Fordham in the early hours of 16 December 2013 with a .22 gun. He had drawn John Fordham out of his house by repeatedly interfering with the power supply to the house. His shot missed. He did this because Kiki Colmar and Graham Hack had repeatedly urged him to shoot and kill John Fordham, and because each had said they would pay him VT 3 million if he did so.
18. The plan had been formed between Kiki Colmar and Paul Tunat between July 2013, shortly after his release from prison, and the date of the shooting; and there had been a number of meetings at which the urgings were made. Paul Tunat said that at one meeting he had obtained some .22 bullets in a black pouch from Kiki Colmar, and during their planning he was given VT 15,000 by Graham Hack and VT 5,000 by Kiki Colmar.
19. Shortly after the shooting, Paul Tunat let Graham Hack know he'd shot at John Fordham. He did that by going to the house of a Harris Kalopong and getting him to pass on the message, as required by Graham Hack. Later he went to Kiki Colmar's office and told Clara to pass on the same message but added that he'd missed.
20. Paul Tunat accepted that on earlier occasions he had said that it was Wilfred Simeon who had fired the shot at John Fordham – not him. Paul Tunat tried to give me two statements (made by Simeon and Elison) to the effect that each of them claimed Wilfred Simeon to have been the shooter. Paul



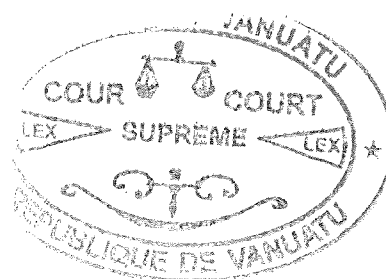
Tunat agreed that when sentenced for the shooting, the explanation provided to the Supreme Court was that he had the gun with him as protection from John Fordham's dogs – not that he took the gun there to shoot John Fordham. He agreed that subsequently in the Court of Appeal, the Court was advised that he had gone to John Fordham's home to steal - not that he took the gun there to shoot John Fordham. Paul Tunat was also forced to accept in cross-examination that he has given at least 2 different versions regarding how he got hold of the gun he used; and 2 different versions of how he had come by the .22 bullets.

21. John Fordham told me it was Paul Tunat who had shot him – he was unchallenged as to that.
22. On 17 December 2013 he received a suspicious phone call from Kiki Colmar late in the morning. After he picked up the handset, there was a long pause. He knew from the phone's memory that Kiki Colmar was calling – eventually he said "Yes, Kiki. What do you want?" John Fordham thought it very strange that Kiki Colmar was calling him for the first time in some 18 months, especially when Kiki Colmar then asked John Fordham, on no less than 3 occasions, if he was alright or ok. Three times John Fordham replied that yes he was alright. John Fordham considered that Kiki Colmar was speaking in a softer and more tentative manner than usual. Eventually Kiki Colmar told John Fordham that Colmars had been delivered too much green kava, and would he be interested in buying 180kgs of green kava. John Fordham considered this to be Kiki Colmar's rapidly invented excuse for the making the phone call and to cover up his incredulity that John Fordham was still alive.
23. John Fordham gave detailed evidence about grudges both the Colmar family and Graham Hack had against him due to their past dealings. He invited the Court to infer that each had a motive for the attack on him. He also gave evidence that in his view the police investigation into who had shot at him and why left a great deal to be desired. Frequently, it appears, he was asked to assist the police investigators by providing vehicles and fuel as well as cash – and he often went with police officers while they were conducting inquiries. He agreed he offered VT 2 million for information regarding the case.
24. Tyrone Kalo told me that in December 2013 he saw Paul Tunat with a gun. He also told me that on 27 December 2013, he hid some .22 bullets contained in a black pouch under a banyan tree after he received them from Paul Tunat.
25. Evidence was given as to various meetings involving Paul Tunat in the company of Kiki Colmar. Paul Tunat told the Court he had first met Kiki Colmar at Unity Shell, with later meetings at Monix Plantation. There was a second meeting at the Aqua bar in July 2013 on a weekend evening, and Peter Vai and Nera Kenneth also gave evidence as to that event. There were occasions they were seen together at Liman Plantation, as evidenced by Paul Tunat, and Joel and Simeon Tatau; and also at Assy Roy's house as evidenced by Anna Tasso and Rosslyn Terry. There was another meeting between Kiki Colmar, Graham Hack and Paul Tunat at the Post Office, as evidenced by

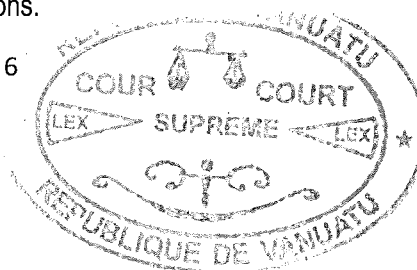


Joel and Simeon Tatau. Paul Tunat also told me about other meetings involving Graham Hack at both Liman and Monix plantations.

26. Paul Tunat told me the subject of his shooting John Fordhm was mentioned at all these times. The inference the Court was invited to draw from this evidence was that there was considerable interaction between Paul Tunat and the defendants, and that what they had in common was their plan to execute John Fordham.
27. There was other prosecution evidence, both led and produced by way of consent. I make no mention of that evidence as I found that this further evidence was of no assistance to me in determining the matters I needed to decide. However, I do comment on one aspect: Willie Pakoa is a former Police Officer, currently apparently a private investigator. He effectively threatened both defendants that he would charge them if they did not co-operate with his investigation by providing statements. He ought to know better. He has no legal authority to charge anyone. What he did in this case is completely beyond the bounds of the law. His behavior will be referred to the Public Prosecutor.
28. Kiki Colmar chose to give evidence. He told me that the first time he had met Paul Tunat was at the Aqua Bar on a weekend evening. He was introduced to him by his friend Assy Roy. They shared a few drinks, but Kiki Colmar was busy with his friends, as was Paul Tunat. He subsequently recalls briefly greeting Paul Tunat one day when near to the Post Office. Those two occasions are the only contact Kiki Colmar recalls with Paul Tunat.
29. Kiki Colmar denies all the other meetings referred to by Paul Tunat and the other witnesses. He also denied ever employing a Clara to work at his offices.
30. Kiki Colmar does recall the phone call of 17 December 2013. He said he became aware that a supplier had over-supplied 168kgs of green kava. He thought he could press his customer to purchase the extra; but his father cautioned against that and suggested he call John Fordham who would have the capacity to accept such quantity. It was a routine business call, but John Fordham was not buying. Kiki Colmar thinks there was some hesitation in answering, but denied 3 times asking if John Fordham was alright. Kiki Colmar says there was nothing sinister about the call.
31. Kiki Colmar accepted that the Colmar family was in competition with John Fordham they both being involved in the kava industry, but denied that the Colmar empire was diminishing. The kava side of the business was expanding according to Kiki Colmar. He had no grudge against John Fordham. He did not plan to get Paul Tunat to shoot John Fordham; he did not supply Paul Tunat with .22 bullets, and he did not give him VT 5,000.

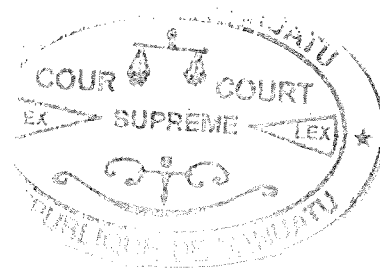


32. Kiki Colmar was cross-examined about his drinking habits – that did not assist me. He was asked about leaving Vanuatu shortly after the shooting, and he confirmed he went via New Zealand to collect his then girlfriend and travel to India for a holiday. He maintained there was nothing to infer from that.
33. There followed a number of defence witnesses, who did not assist in my task. In particular, I comment that Samson Bala was entirely not credible. He told me he took 3 lots of cash from Willie Pakoa, totaling VT 10,000, to give a statement about this case even though he says he knew nothing about the case. His evidence will be referred to the Public Prosecutor. It played no part in my decision.
34. Clara Fred also gave evidence – to the effect that even though she had never worked for Kiki Colmar but Paul Tunat had repeatedly tried to make her say otherwise. As this evidence was not put to Paul Tunat when he gave his evidence, to give him the opportunity to refute it or accept it, I disregarded Clara's evidence.
35. Assy Roy told me that he introduced Paul Tunat to his friend and employer Kiki Colmar at the Aqua Bar. There was no conversation that he heard about any shooting being planned.
36. Olive Able told me that shortly prior to Xmas 2013, there was an over-supply of green kava of about 200kg at Colmar's. Kiki Colmar was advised and he then used his telephone to call John Fordham to see if he could sell the excess kava to John Fordham – John Fordham was not interested. Eventually the excess kava had to be buried temporarily to preserve it.
37. Peter Colmar, Kiki's dad gave evidence about his involvement in the kava industry; and he too maintained that the Colmar business was expanding. He produced some accounts, which on my reading don't sit entirely well with that, but do show that the business is not hopelessly deteriorating (which is what the prosecution was suggesting as a reason for their disharmony). Peter Colmar used to be friendly with John Fordham, but over time that has evaporated. He admitted to having issues with Willie Pakoa exhibiting bad temper and behaving in a manner not designed to win favours. He denied having any grudge with John Fordham; and, despite at one stage swearing at John Fordham, denied ever saying he "would soon be in his grave".
38. Graham Hack also chose to give evidence. He told me had never met or even seen Paul Tunat until he gave evidence on the first day of trial. He did not know a Harry Kalopong – he could not explain how, why or from whom a text to his phone at 2.38am on 16 December 2013 had been sent. He repeatedly told me he had no grudge against John Fordham, whom he used to employ.
39. In cross –examination, he had to accept the animosity between himself and John Fordham had continued on for some years, and was at least in part due to numerous Court battles between them. He strenuously denied all the allegations.



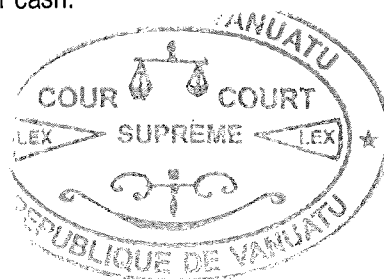
F. Evaluation of the Evidence

40. It is not possible to infer that, even if all these meetings took place between Paul Tunat, Kiki Colmar and Graham Hack, that the topic of shooting John Fordham was raised. There are too many other possibilities to make such an adverse finding against the defendants. The only evidence as to what took place at the meetings, if they took place, is from Paul Tunat.
41. Mr Sugden submitted that there was ample clear evidence to show that a number of these meetings did take place; and that the denials by both defendants could then be used to support the prosecution case. That is correct in law, provided I was sure they were lies and bore in mind that telling lies about certain matters does not equate to guilt. As well, it is the reasons for the telling of the lies that is all important if the evidence is to be used in any way.
42. I accept, that if the meetings did take place, that would go quite a long way to undermining the evidence of both defendants – but I reminded myself they need not prove anything.
43. I concluded that I did not need to determine whether all the meetings took place or not. The real issue is whether Paul Tunat was repeatedly urged by either or both defendants to shoot and kill John Fordham. Whether the meetings occurred or not could assist me only in determining whether there was the opportunity for the planning alleged by the prosecution. What was discussed between them is the crux of the case.
44. What the prosecution case really consists of comes down to what Paul Tunat told me, in the face of the total denials by both defendants; and against a background of acrimony against a number of those within the kava industry at Luganville. The second telling aspect of the evidence is the 17 December 2013 phone call between Kiki Colmar and John Fordham. The third aspect of the evidence is the text Graham Hack received at an odd time of night, but shortly after the shooting.
45. I deal with the 17 December 2013 phone call first. Not only does Kiki Colmar say it was simply a business call, but that is supported by Olive Able. Further, John Fordham agrees that there was a business element to the call. I take nothing from the differing amounts of green kava mentioned by the witnesses – be it 168, 180 or 200 kg. What might make the call sinister is if what John Fordham said about the call was true.
46. John Fordham is quite naturally upset at what occurred, and he was entitled to far greater service from the Police than he described. However, his extremely close connection with the investigation that led to this prosecution and the prosecution itself, demonstrates a desire for revenge – almost at any cost. His evident pleasure at the discomfort of the defendants when they were being cross-examined in relation to really serious criminal charges show a lack of objectivity. The offer of cash for information would have been acceptable if the information were then given to the police. There



is evidence here of cash being paid for quite unreliable information, even made up accounts. The dangers of victims doing their own investigation/prosecution can hardly be better seen.

47. John Fordham strikes me as very keen to get a conviction at all costs – this evidence is designed to achieve that. I do not accept him as an objective reliable witness.
48. There are two further considerations. Firstly, if Paul Tunat is to be believed, he passed on the message to Clara that he had shot John Fordham, but had missed; and if (which is not accepted) Clara had passed that on to Kiki Colmar, then why should Kiki Colmar later be surprised to be able to speak to John Fordham – he already knew from Clara that the attempt to kill had failed. As well, Kiki Colmar told me that he had greeted John Fordham earlier that morning near his offices while John Fordham was getting some fuel. John Fordham said he could not recall that – but he did not dispute the possibility. Again if that had occurred, then Kiki Colmar would not have been surprised during the later phone call.
49. I conclude that the evidence of the phone call is not the damning evidence the prosecution would like it to be.
50. The text Graham Hack received is oddly timed. However, there is no evidence as to who sent it, or what the message contained. It is pure speculation it is from a person by the name of Harris Kaltopong advising Graham Hack that the shooting had taken place. I place no weight on this piece of evidence.
51. Paul Tunat's evidence was severely undermined by his large number of inconsistent statements, which I detailed earlier. In short, I cannot be sure he was an honest witness. However, I am sure he is an unreliable witness. I cannot safely place any weight on what he had to tell me where it was not corroborated by other evidence.
52. I accept completely that he shot at John Fordham with the premeditated intention of killing him. However, I do not accept his evidence that he was driven to do that at the behest of either Kiki Colmar or Graham Hack – that has not been proved beyond reasonable doubt. His motives for engaging in that conduct remain unclear.
53. I am not sure that the animosity between the patriarchs (Peter Colmar, John Fordham and Graham Hack) is due to their competitive nature to do with their businesses – I can see from the way in which each gave evidence that there are strong and abrasive personalities involved. I am sure each is capable of outbursts of bad temper and bad behavior, especially when protecting their hard earned assets. I do not include Kiki Colmar in that, but cannot exclude the possibility of his acting on behalf of the family, and especially on behalf of his father. It remains unproven for me that the evident animosity between these prominent business men is sufficient to cause the defendants to go to the extra-ordinary length of arranging a killing for cash.



54. If Graham Hack were minded to resort to such drastic steps, I venture to suggest he would likely do it alone, rather than join in with Kiki Colmar. I am also unsure he would countenance an outlay of VT 3 million for such a plan – his previous Court battles indicate a reluctance to easily part with his money.
55. What the prosecution is asking the Court to do is to not just examine the motives of Paul Tunat in shooting at John Fordham – it is further asking the Court to examine the motivations, if any, of Kiki Colmar and Graham Hack to cause Paul Tunat to shoot at John Fordham. The prosecution needs to prove beyond reasonable doubt that their motives caused them to solicit Paul Tunat with the promise of money and to assist him in the endeavour by encouragement and the provision of the necessary .22 bullets.
56. I return to the elements that need to be proved in relation to charge 1. The first element required to be proved is that Kiki Colmar and Graham Hack solicited a planned intentional attempted killing. The prosecution has failed to establish that beyond reasonable doubt. I do not need to go on and consider the other elements.
57. I return to the elements that need to be proved in relation to charge 2. The first element requires the prosecution to prove that Kiki Colmar and Graham Hack aided counseled or procured an intentional attempted killing. The prosecution has failed to establish that beyond reasonable doubt. I do not need to go on and consider the other elements.
58. The prosecution case accordingly fails.

G. Result

59. Kiki Colmar and Graham Hack are not guilty of soliciting attempted intentional premeditated homicide – charge 1.
60. Kiki Colmar and Graham Hack are not guilty of aiding counseling or procuring attempted intentional unpremeditated homicide – charge 2.

DATED at Luganville this 23rd day of November 2018

BY THE COURT


Justice G.A. Andrée Wiltens

