

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

**Criminal  
Case No. 23/167 SC/CRML**

**BETWEEN: PUBLIC PROSECUTOR**

**AND: MICHEL BENKOR**  
Defendant

*Date of Trial:* 13<sup>th</sup> & 14<sup>th</sup> day of June 2024  
*Date of Verdict:* 12<sup>th</sup> day of July 2024  
*Before:* Justice W. K. Hastings - via zoom link from the District Court in Wellington, New Zealand  
*Counsel:* Ms. L. Lunabek for the Public Prosecutor – via zoom link from the Supreme Court in Port Vila  
Mr. J. Garae for the Defendant – via zoom link from the Santo Courthouse  
Defendant- via zoom link from the Area Administrator's Office in Pangli, South Pentecost

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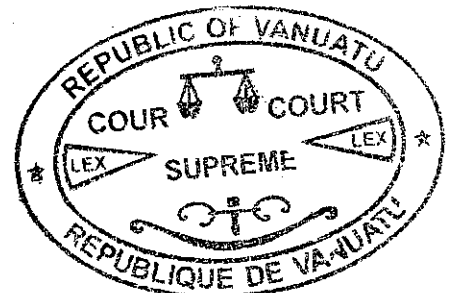
**VERDICT**

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1. This judgment concerns an incident that took place between a group of men from Lonbwe village in the southern part of Pentecost Island, and a larger group of men from Baie Barrier village, also in South Pentecost.
2. Lonbwe is a custom village inland from the sea in the forest. The men wear nambas<sup>1</sup> and carry bows and arrows through the forest to shoot birds. They also maintain a water taro garden closer to the sea, and closer to Baie Barrier. They have no formal western education, no western religion, and do not generally know how old they are. They speak Sa, a Melanesian language spoken by about 2,500 people in this region of South Pentecost. We were fortunate to have Gary Olul, an interpreter who could interpret English and Bislama into Sa, and vice versa.

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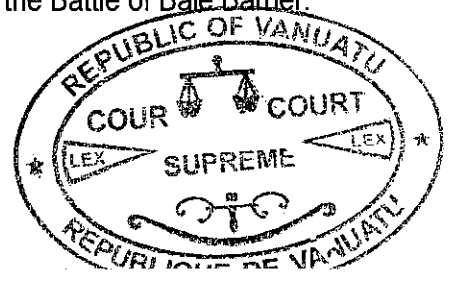
<sup>1</sup> A namba is a penis sheath.



3. Baie Barrier is a village on the sea, below Lonbwe. It has a Roman Catholic mission and a store. The men from Baie Barrier are Christian and wear western clothes. They also speak Sa. Although they were occasionally referred to as "*the boys from Baie Barrier*" which has a nice alliterative sound, I will refer to them as what they were, men.
4. The incident leading to the charge can only be described as a battle on the Baie Barrier beach. It happened on 2 June 2022. Baie Barrier Beach is a stunningly beautiful light sand beach bordered by coconut trees. It lies below the thickly forested mountains of southeast Pentecost. A video, to which I will return later, shows about 16 men from Baie Barrier dressed in western clothing armed with stones and sharpened bamboo spears, confronting about 7 men from Lonbwe wearing only nambas and holding bows and arrows. As the men from Baie Barrier approached the men from Lonbwe ever more quickly, all but one of the men from Lonbwe ran into the bush. At the end of the battle, that man from Lonbwe had fallen to the sand. The men from Baie Barrier danced and chanted around the fallen man. Then the video ends. Eyewitnesses said that when the men from Baie Barrier finished dancing and chanting, they departed the beach, leaving the deceased on the sand face down where he fell. The men from Lonbwe then ventured out from the bush and carried the body back up to Lonbwe for a custom burial.
5. Two weeks later the body was exhumed to determine the cause of death.

### **What happened before this trial**

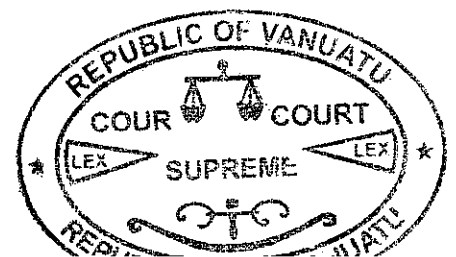
6. The defendant in this case, Michel Benkor, was charged with premeditated intentional homicide contrary to s 106(1)(b), and riot contrary to ss 68(3) and 70, of the Penal Code [Cap. 135]. He, with three others, appeared for trial in Luganville on 22 August 2023. Each of them pleaded not guilty to both charges. The prosecutor entered a nolle prosequi (he offered no evidence) under s 29 of the Criminal Procedure Code 2006 [Cap 136] on each of the charges against the three other defendants, and on the riot charge against Mr Benkor. That left only the murder charge against Mr Benkor to be tried. Unfortunately, the presiding Judge had to declare a mistrial in respect of the remaining charge.
7. Mr Benkor was due to be retried on the murder charge. On 12 June 2024, the murder charge was amended to a charge of intentional assault causing death contrary to s 107(d) of the Penal Code, to which the defendant pleaded not guilty.
8. This time the trial was held in Pangi, the administrative centre of South Pentecost, on the opposite side of the island from Baie Barrier. Despite not having a courthouse, Pangi was chosen for security reasons. Tensions were still high 2 years after the Battle of Baie Barrier.



9. We intended to use the Area Administrator's conference room, but it was too small and had only one door near a table that could double as the bench, a door through which everyone had to enter and leave. We decided on the church hall, still boarded up after cyclone Harold, but a much bigger room that could accommodate about 50 people. The hall was rapidly turned into a Court – iron over the windows was removed, timber stored in the hall was taken away, tables were brought down from the Area Administrator's office, and plastic chairs were commandeered from the nearby church. We are grateful to the people of Pangi, and the 9 police and community safety officers who provided security, for so efficiently transforming the church hall into a functional courtroom.
10. Having found a courtroom, the next issue was to ensure the defendant and the prosecution witnesses showed up. It was by no means certain from perusal of the file that they knew this trial was about to take place. The defendant's father had a cellphone, but was initially vague about his son's whereabouts. Counsel decided to travel to the eastern side of the island where there are no roads. The prosecutor, Ms Lunabek, travelled by truck to the end of the road, and then walked through the forest to Lonbwe. She obtained statements from 3 witnesses. Defence counsel, Mr Garae, the probation officer, the Area Administrator and several police officers took a dinghy around the south of the island to Baie Barrier, where Mr Garae persuaded the defendant's father and his Chief to ensure the defendant appeared for his trial the next day. Both counsel returned safely at the end of the day (despite no one wearing life jackets in the boat), and I am in awe of their determination to see that justice was done in South Pentecost.
11. The next day, a small flotilla of boats arrived at Pangi Beach. People from both villages had arrived. The trial was going ahead.

### **What happened at trial**

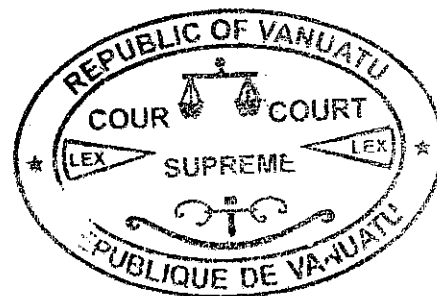
12. The defendant took his seat beside defence counsel. The courtroom was full. People peered into the courtroom from outside, where they were two or three deep. Police officers were stationed at the doors to the right and left of the table serving as the bench, and at the rear door where members of the public entered and left.
13. Section 81 of the Criminal Procedure Code was read to the defendant and interpreted into Sa. He was told he would be presumed innocent until the prosecution had proved his guilt beyond reasonable doubt. He was told it was not his job to establish his innocence. He was told that if I had a reasonable doubt about his guilt at the end of the trial, then he would be found not guilty. On the other hand, if I was sure that he did what the prosecution said he did, then he would be found guilty. It seemed to me that most people in the courtroom were not familiar with the



common law legal system or with how the trial would be run, so after saying good morning to the gallery in Sa and asking if they were alright, I addressed them directly. I explained that the prosecution would present its case first because it had the burden of proving the charge against Mr Benkor, and that Mr Benkor did not have to prove his innocence, or say anything at all unless he wanted to. I explained that I would not make up my mind until after I heard all the evidence and what the lawyers wanted to say to me.

14. The prosecution called three witnesses: Bebe Teolnamul and Holul Bebe Teonamul, both from Lonbwe, and Bong Sandy, a passerby from Bunlap village who witnessed the battle. All gave their evidence in Sa. The witnesses' demeanour was a small part of my assessment of them. I also looked for consistency with the evidence of other witnesses whose evidence I accepted as credible and reliable, consistency with relevant exhibits, consistency with any previous statements made by each witness, and the inherent plausibility of each witness's account.
15. The prosecution also produced 13 exhibits:

- Exhibit 1            A statement dated 18 July 2022 of Cooks Thompson, the police officer who with the pathologist and 3 other police officers oversaw and participated in the exhumation of the deceased's body;
- Exhibit 2            A letter dated 8 August 2022 from Dr Crystal Garae Tarinavanue stating "*The postmortem findings revealed that late Mr RIP Malwajuru's cause of death was from extensive skull fracture due to multiple blunt force injuries to the head.*"
- Exhibit 3            A death certificate for RIP Malwajuru stating the cause of death to be "*extensive skull fracture*" and the antecedent causes to be "*multiple blunt force injury to the head*";
- Exhibit 4            Figure 1: photograph of the burial site;
- Exhibit 5            Figure 2: photograph of the body in situ wrapped with custom mats and tied with nabang roots;
- Exhibit 6            Figure 3: photograph of the body after removing the mats;
- Exhibit 7            Figure 4: photograph of the deceased's head showing a circular hole in the right side of the skull;
- Exhibit 8            Figure 5: photograph of Baie Barrier beach;

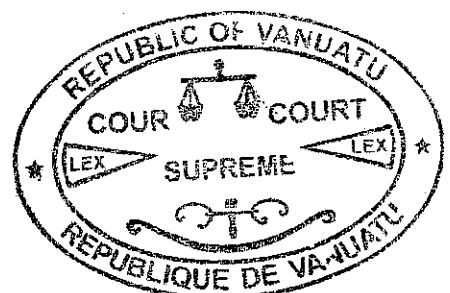


- Exhibit 9      Figure 6: photograph of 3 people on the beach, one pointing to where the deceased fell;
- Exhibit 10     Figure 7: photograph of the deceased's body face up on the beach
- Exhibit 11     Also described as Figure 7: photograph of the deceased's body face down on the beach surrounded by scattered rocks;
- Exhibit 12     The flash drive containing the video footage of the battle, but not the specific incident resulting in the deceased's death;
- Exhibit 13     A hand-drawn map of the beach, marked by Bong Sandy to show where he was on the beach during the battle.

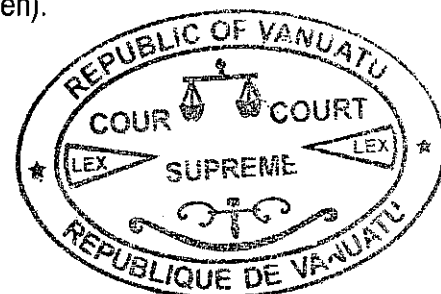
16. I reminded myself that if I were to draw inferences, they could not be guesses or speculation but had to be logical conclusions drawn from other properly established facts. Adverse inferences are to be drawn only if they are the only available inferences to be drawn. If more than one inference was available, the inference most favourable to the defence must be drawn.
17. I turn now to the evidence of the prosecution witnesses. As there was no recording equipment, the evidence is set out more extensively from my notes than would be the case if recording equipment had been available.

**The evidence of the prosecution witnesses**

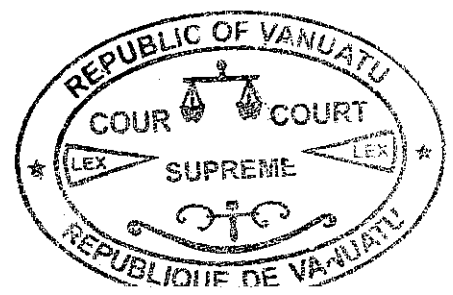
18. Bebe Teolnamul (I will refer to him as Bebe) was affirmed. He said he, Holul Teolnamul (Holul) and Rob Malwajuru (Rob) left Lonbwe to check on their water taro garden located close to the sea. He said Michel Benkor and other men from Baie Barrier ran towards them holding spears and rocks. He said he knew there was going to be a fight and that one of the Lonbwe men would be injured, so he and Holul ran into the bush. Rob was left on the beach. He said he was about 60 metres away from where Rob was, no trees were in the way, and his view was unobstructed. He said he saw the defendant pick up a stone from the water and throw it at Rob's head. He said the stone hit the top part of his head. Rob fell to his knees, and when one of the Baie Barrier men climbed onto his back, he fell on his stomach to the sand. He said one of the Baie Barrier men kicked Rob in the stomach, and another pierced his left arm with a bamboo spear. He said when Rob fell to the sand, the men from Baie Barrier surrounded him and shouted, "*now we've got one of you.*"



19. The video was played to him on Ms Lunabek's computer. He identified as many people as he could, both from Baie Barrier and those from Lonbwe. He did not identify the defendant in the video but said from memory that he was not wearing a shirt.
20. In cross-examination, he said they went to the water taro garden first, and went to the beach after. He said they carried bows and arrows because "it was a time of fighting" and that the Baie Barrier people had destroyed their water taro garden. He denied intending to fight the Baie Barrier men on this occasion. He admitted that families from Lonbwe had earlier damaged the mission church and classrooms at Baie Barrier.
21. He said many of the Baie Barrier men were throwing stones at them. He said they dodged the stones and ran into the bush because each of them feared getting hit by one of the stones. He insisted there was nothing blocking his view of the battle from where he was standing in the bush behind a rock. It was put to him that with so many stones being thrown, he could not be sure which stone hit Rob and by whom it was thrown. He said he saw the defendant pick up a stone from the water and throw it at Rob's head. It was put to him he did not see what happened. He said he saw what happened.
22. After they buried Rob, he denied there was a meeting at Lonbwe during which one of the participants told him that it was the defendant who killed Rob.
23. He said in Court the battle happened at mid-day, but it was put to him that in his police statement he said it was at 2.30 in the afternoon. He said midday is the correct time. He also said he knew his statement to the police was true.
24. In re-examination, he said he ran towards the bush, then he stood and looked back, and saw the defendant pick up the stone and throw it at Rob's head. He said he saw it hit Rob's head, and then he saw Rob fall.
25. I asked him how old he was. He replied, "*I am not educated.*" I asked him about the cause of the tensions between the two villages. He said the Lonbwe people had put namele leaves on the beach to stop other people from taking coconuts, and then the namele leaves had been removed.
26. I asked him questions to establish how well he could see. I asked him to look out the door to my right and tell me what the woman in the house about 80 metres away was holding. He correctly identified some material. I asked him what colour it was. He said he did not know, not because he could not see, but because he had no words for the colour (it was green).

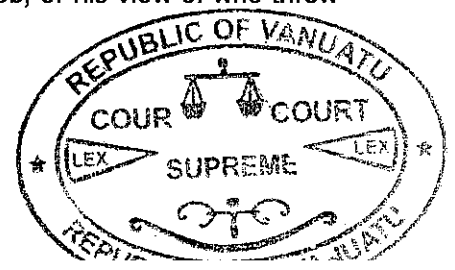


27. There were no questions arising from my questions.
28. The next witness was Holul Bebe Teolnamul. He was also affirmed. He said he went to check on the water taro garden with Rob and Bebe. He said Rob was his father and Bebe is his brother. He said he had a knife with him to cut taro. He said after they checked on the garden they went back to the beach. That was when the Baie Barrier men chased them throwing stones. He said there were about 40 metres between him and Rob. He said Rob could not run as fast as the others because he was heavier, and that was when he was hit with the stone. He said he was still on the beach when Rob was hit, and then he ran into the bush. He said he had a clear view and saw the defendant pick up the stone from the water and throw it, hitting Rob's head. He also said the defendant was not wearing a shirt. He said when Rob was stoned, he fell to his knees, then to his elbows, and then to the ground. He said Rob was kicked, and he heard one of the Baie Barrier men shout words to the effect "*one of you is already dead.*"
29. He was asked how he could be sure that the stone that hit Rob was the stone thrown by the defendant. He said he saw the defendant throw the stone that hit Rob from where he was standing on the beach. He moved off the beach after he saw the stone hit Rob. After the Baie Barrier men left, he said they sent word to Lonbwe for help to carry Rob's body back up to the village for burial.
30. In cross-examination, he said he did not have a bow and arrow, but the others from Lonbwe did, including Rob. He denied that Rob told him they were going for a fight. He said they took the bows and arrows with them because there was "*fighting already in place*" by which I took to mean he was aware of hostility between the two villages. He said when Rob fell, he just stood there on the beach and did not run into the bush or up the hill. He denied hiding from the Baie Barrier men but agreed that lots of stones were being thrown.
31. When he was asked how he knew the stone that hit Rob was the stone that the defendant threw, he said he saw the defendant pick up the stone, run towards them, throw the stone and that the stone hit Rob. He said Rob was bleeding heavily from the impact. He said he saw it with his own eyes and heard it with his own ears, and he stood on the beach and watched them kill Rob. He said he and the others were dodging stones from where they stood. When it was put to him that he could not see that it was a stone thrown by the defendant that hit Rob because he was too busy defending himself and avoiding stones, he said he saw what happened. He said he did nothing to save his own father because if he had, they would now both be dead.
32. After taking the body back up to Lonbwe, he denied there were discussions about who killed Rob. He said no one told him who killed Rob; he saw it with his own eyes. He said he saw the



defendant throw one stone, and that it hit Rob. He also said the defendant was not wearing a shirt.

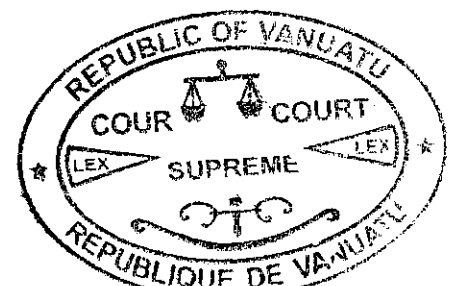
33. In re-examination, he said when he referred to "*what he heard with his own ears*" in his police statement, he was not referring to any village meeting, but rather to what the Baie Barrier men said on the beach.
34. I asked him some questions. He said he regularly carried a bow and arrow for shooting birds in the forest. He said many stones were being throw simultaneously and continuously. I asked him why he did not use the bow and arrow to defend himself. He said he could not shoot when dodging stones, so he put the bow and arrow on the ground and moved away. He said there was nothing distinctive about the stone that hit the defendant. It was black, but so were the others.
35. He said there were no earlier battles on the beach. He said the tensions arose when the namele leaves placed on the beach by Lonbwe people to stop fishing were removed, not by Lonbwe people, three days before the battle. He said his village has the authority to put namele leaves on the beach. I asked if he knew whether the Baie Barrier people thought the Lonbwe people were over-reaching when they place namele leaves on the beach. He said they did not act beyond their rights.
36. There were no questions arising.
37. The third witness was Bong Sandy. He was affirmed. He lives in Bunlap, another custom village in the hills above the eastern coast of Pentecost. He said he and three others left Bunlap to go to the store at Baie Barrier. They walked along the beach to get to the store, but before they got to it, the battle erupted. They were behind the Baie Barrier front line so to speak, and beside the person who was recording the battle with his phone. He said he had an unobstructed view. He said there were many men from Baie Barrier running with bamboo spears and stones towards the men from Lonbwe. He said he saw the defendant pick up the stone and throw it at Rob. He said he saw it hit Rob's head. He said he saw Rob fall to the sand, and he saw someone kick him. He said all the Lonbwe men wore custom dress, carried bows and arrows, and retreated when Rob was stoned. He said they left after the Baie Barrier men left.
38. The Court adjourned before 6 o'clock because we were running out of light. On resuming the next morning, Bong was reaffirmed and cross-examined. He said he did not see any men from Lonbwe throw stones at the Baie Barrier people – it was only the Baie Barrier men throwing stones at the Lonbwe men. He reckoned there were 6 men from Lonbwe on the beach. He said the Baie Barrier men did not block his view of the stone thrown at Rob, or his view of who threw





the stone. He said he saw the defendant pick up a black stone from the water. He drew a picture of where he was on the beach – closer to the waterline, with a diagonal view up the beach. He denied there was too much happening on the beach to see what happened to cause Rob to fall down. He said he saw the defendant throw the stone that hit Rob and then the Baie Barrier men ran towards Rob to dance and chant. He said after the defendant stoned Rob, he and his companions moved to the mission.

39. He said he saw Rob throw a stone at the defendant first but he missed. He saw the defendant then throw a stone at Rob, which hit him in the head. He said it was normal to wear a namba and to carry a bow and arrows when leaving the village. He said it was not a sign of aggression. He said he was unaware of the namele leaves incident.
40. The prosecution closed its case.
41. Mr Garae submitted there was no case to answer. He submitted that the medical report stated the cause of death was from "*extensive skull fracture due to multiple blunt force injuries to the head.*" He submitted the prosecution evidence pointed to one assault, and there was no evidence of two or more assaults that would support the medical report's findings of "*multiple blunt force injuries to the head.*"
42. Ms Lunabek submitted that one stone can impact a skull leading to multiple injuries and extensive skull fracture. Exhibit 7, a photograph of the disinterred skull annexed as Figure 4 to Officer Cooks Thompson's statement of 18 July 2022, shows a hole in the skull in the shape of a round stone, thought by the Crime Scene Investigation Unit to be sufficiently significant to have drawn a red arrow pointing to it.
43. I declined Mr Garae's application. I ruled the prosecution had established, on the evidence of three eye witnesses, the medical report, the death certificate and the photograph of the hole in the skull of the deceased, a prima facie case that the deceased had been hit in the head by a stone or stones, that there was consistent evidence from three eyewitnesses that the defendant threw the stone that hit the deceased's head, and that the deceased died as a result of the damage to his skull. I also indicated that the prosecution evidence seemed to show that the 16 Baie Barrier men were acting in concert and had a common purpose, and that many stones were thrown at the Lonbwe men in execution of that purpose.
44. I then gave the defendant a statement of his rights under s 88 of the Criminal Procedure Code. I told him that he could call other persons as his witnesses, and that he could give evidence himself, subject to cross-examination by the prosecution. I told him he was not obliged to give or



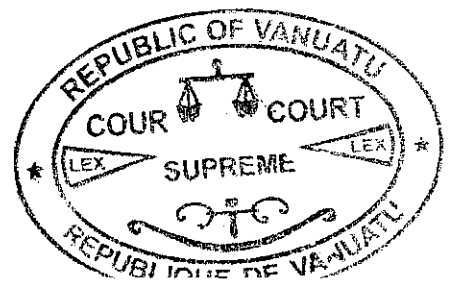
call evidence and he could choose to remain silent. I said if he did not give or call evidence, that alone would not lead to an inference of guilt against him.

45. Mr Garae made an opening statement. He said the issue in this case is whether or not the defendant threw the stone that hit Rob's head which caused the injury that resulted in his death. Mr Garae said the defendant was part of a group of 16 men from Baie Barrier who were throwing stones at the men from Lonbwe, but he was not the one who killed Rob on 2 June 2022. He said the defendant elected to remain silent. No evidence would be called on his behalf.
46. Both counsel requested the opportunity to make written closing submissions, including on the evidential issue presented by the video being played to the prosecution witnesses 2 days before the trial. Submissions were timetabled. The prosecution submissions were to be filed and served by 19 June 2024 (they were filed on 21 June 2024); the defence submissions were to be filed and served by 21 June 2024 (they were filed on 24 June 2024). I undertook to deliver the verdict by zoom to the Area Administrator's computer with at least one day's notice so that the participants in the trial and the people who came to watch the trial would be able to come from Baie Barrier and Lonbwe to Pangi to witness the delivery of the verdict.

### Submissions

47. Ms Lunabek submitted that I can be sure from the evidence of the 3 eyewitnesses that the defendant intentionally assaulted the deceased by throwing the stone that hit his head. She submitted that I can be sure from the postmortem findings, the death certificate, and the photographs of the injuries, that the damage to the deceased's head caused by the stone resulted in his death. She submitted that if I am not sure that the stone thrown by the defendant was the stone that hit his head, then I can be sure that the men from Baie Barrier including the defendant, all of whom were running towards the men from Lonbwe including the deceased, had a common purpose, which was to assault the people from Lonbwe. She submitted that as a result, the defendant is equally responsible for his death.
48. She relied on *Public Prosecutor v Kasaura* [2018] VUSC 32 at para 123, a case in which the Chief Justice found several defendants had acted in concert to pursue "a common criminal design." Citing *McAuliffe v The Queen* [1995] HCA 37, the Chief Justice said at para 166 that

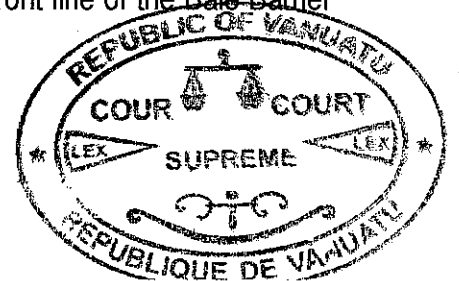
*a joint criminal enterprise comes into being when two or more persons agree to commit a crime. The existence of the agreement need not be express and may be an inference from the parties' conduct. If the crime that is the object of the enterprise is committed while the agreement remains on foot, all the parties to the agreement are equally guilty, regardless of the part that each has played in the conduct that constitutes the actus reus.*



49. The Chief Justice also cited with approval *Davies v Director of Public Prosecutions* [1954] AC 378 in which Lord Simonds said:

*I can see no reason why, if half a dozen boys fight another crowd and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of the knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to common assault, and there was no evidence that Lawson, a party to that common assault, knew that any of his companions had a knife, then Lawson was not an accomplice in the crime consisting in its felonious use.*

50. Mr Garae on the other hand submitted that inconsistencies in the witnesses' evidence meant their evidence lacked credibility to the extent that I could not be sure of the defendant's guilt.
51. Mr Garae submitted that Bebe said only he, Rob and Holul went to the water taro garden and then to the beach, but then conceded after he watched the video that more men from Lonbwe had gone down to the beach. He submitted Bebe's evidence was unreliable because he could not have seen the defendant throw the stone that hit the deceased from where he was standing behind a rock 60 metres away, and while he was dodging so many other stones. Mr Garae also submitted that the time of the incident in Bebe's police statement (2.30pm) was different from the time he said in Court that the incident took place (midday).
52. Mr Garae submitted that Holul's evidence lacked credibility. He submitted that if the men from Lonbwe had been to the water taro garden, they would have been holding taro when the incident happened; the video shows they were only holding bows and arrows. Mr Garae submitted Holul also got the numbers wrong – he said there were 3 men from Lonbwe, whereas the video shows 7 or 8. As with Bebe's evidence, Mr Garae queried how Holul could have seen that it was the defendant who threw the stone that killed the deceased, from 60 metres away while he was dodging the stones and spears being thrown at him. Mr Garae also pointed to inconsistencies in when and where Holul said he saw the defendant throwing the stone: he said it was before he ran into the bush; but he also said that he ran and then stopped to look. Mr Garae submitted that this witness said the namele leaves were placed on the beach to stop fishing, whereas Bebe said they were placed on the beach to stop people taking coconuts.
53. Mr Garae submitted that Bong's evidence was unreliable. He submitted he could not have seen as clearly as he said he did from where he was located behind the front line of the Baie Barrier

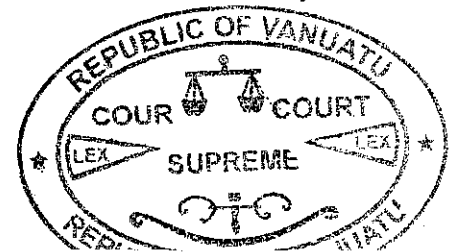


men. If he was standing where he said he was, he would have been about 100 metres away from where Rob fell and would have been distracted by the commotion. Mr Garae also submitted that Bong should not be believed because said there were about 6 men from Baie Barrier, whereas the video shows about 16. Mr Garae submitted that in his statement to the police, Bong said the defendant threw a stone at the deceased, and then the deceased threw a stone at the defendant, whereas in Court he said the deceased threw a stone at the defendant and missed, after which the defendant threw a stone at the deceased, and did not miss. If what he said in his statement to the police were true, Mr Garae submitted this means someone else must have thrown the stone that killed the deceased, as the previous witnesses said the deceased immediately fell to the ground when the defendant's stone hit him.

54. Mr Garae submitted there were enough inconsistencies within the evidence of each witness, and between each witness's accounts, to raise reasonable doubts about the credibility and reliability of each of the prosecution witnesses.
55. Mr Garae also submitted that this was a fight between 2 communities with long-standing grievances. When the Lonbwe men returned to Baie Barrier with bows and arrows after they had earlier damaged church and school property in Baie Barrier, Mr Garae submitted the Baie Barrier people assumed the Lonbwe men came to fight. Mr Garae submitted that in these circumstances, the Baie Barrier men acted in self-defence.

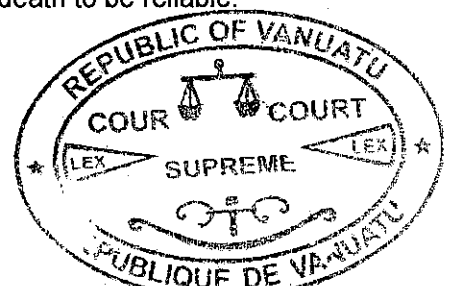
### **Reliability and credibility of the prosecution witnesses**

56. In this section I will deal first with the issues raised by the video, and then make credibility and reliability findings.
57. Ms Lunabek said she showed the video to the witnesses when she travelled to Lonbwe the day before the trial, in order to refresh their memories. Although the maker of the video was not a witness, and there is as a result no evidence about whether he planned to film the assault or happened to be in the right place at the right time, the circumstances in which it was made are apparent from the video itself, and there was no dispute that it showed what was happening, as it was happening, on Baie Barrier beach on 2 June 2022. Of more concern was the effect that showing the video to the prosecution witnesses had on their recollection of what happened that day. When they gave evidence, were they remembering what they saw 2 years ago on the beach, or was their recollection influenced by what they saw on the video 2 days before the trial?
58. Mr Garae submitted that "the video clip clearly disturbed their memories or recollection of what actually happened on 2 June 2022" and pointed to the inconsistencies described above. Ms Lunabek submitted that viewing the video would not have disturbed their recollection in any



significant way because the video did not show who approached the deceased, who threw the stone, or the moment the stone hit the deceased.

59. I agree with Ms Lunabek. The video is useful to set the scene. It shows the beach, it shows the 2 groups of men, and as it was filmed from the Baie Barrier side, it shows the Baie Barrier men running towards the Lonbwe men with spears, knives and stones. From the single direction in which all of them are running, and from the weapons all of them are carrying, they appear to be acting in concert to assault the people of Lonbwe who are at the end of the beach holding bows and arrows. The person filming the action is also running however, and quite often the phone is pointed towards the ground or towards a location away from where the deceased died. As it does not appear to show the immediate circumstances of the deceased's death, it is unlikely to have influenced the prosecution witnesses' recollections of those circumstances. I therefore ruled the video admissible, and found the witnesses' oral evidence about the immediate circumstances of Rob's death to be uninfluenced by what is shown in the video.
60. Mr Garae submitted that the people of Lonbwe had an opportunity to collude in the 16 days the police took to arrive and investigate the incident. He offered no evidence of any such collusion, and the consistency of their stories could be as much a result of accurate recollection as of collusion. The witnesses denied they colluded with each other when Mr Garae questioned them. In the absence of any evidence of collusion, Mr Garae's submissions in this regard are merely speculation.
61. In the absence of any evidence of collusion, and in light of the inability of the video to have influenced the witnesses' recollection of the immediate circumstances of the deceased's death, I have no reason to doubt the witnesses' credibility or reliability on either of those grounds.
62. Each of the witnesses was some distance from where the deceased fell – Bebe and Holul were about 60 metres away on the Lonbwe side, and Bong was about 100 metres away on the Baie Barrier side. I accept that the commotion would have caused considerable distraction – there was a lot going on, many stones were being thrown at the same time, and none of the witnesses could have known in advance that Rob would be the one who would be hit or to look in that direction. On the other hand, the men from Lonbwe were fewer in number, and were either not moving or in retreat as the men from Baie Barrier advanced with increasing speed. It was daytime, there were no obstructions on the beach, and the rock and bushes on the edge of the beach closer to the deceased were not so large as to block the witnesses' view. One can dodge stones and look to where the stones are coming from in order to keep dodging them. The intensity of the moment, and the concentration needed to survive, may well have heightened the senses. I find the witnesses' evidence about the manner of Rob's death to be reliable.



63. I also find the witnesses to be credible for other reasons. Bong in particular was a passerby and was not from Lonbwe or Baie Barrier. Although he said he knew many of the people on the beach, his evidence was least affected by any village affiliation. There were differences in each account, but they do not detract from the fundamental consistency between each witness's account, which is that each saw the defendant pick up a black stone from the water and throw it at the deceased. Each said the stone hit the deceased's head, and that the deceased fell to the ground as a result. This is consistent with the postmortem findings, the death certificate and the photograph of the deceased's disinterred head. Whether it happened at midday or at 2.30 in the afternoon does not affect the consistency of their accounts or the credibility of their recollections 2 years later. None of the witnesses would have been concentrating on the time of day. Nor would any have done a precise headcount of the numbers on each side in the heat of the moment. Indeed, it took counsel and I several viewings of the video to figure out how many men were on each side when we were very much not in the heat of the moment.

#### The law

64. In this section I consider whether the prosecution has proved each element of the offence beyond reasonable doubt.

65. Section 107(d) provides that:

#### 107. Intentional assault

No person shall commit intentional assault on the body of another person.

Penalty

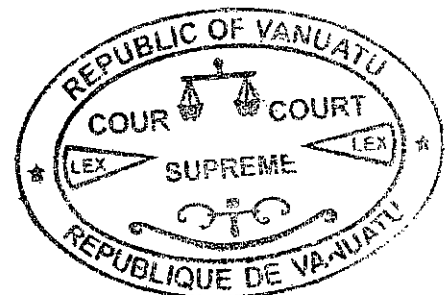
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(d). if the damage caused results in death, although the offender did not intend to cause such death, imprisonment for 14 years.

66. Section 109 defines "*causing death*" but it is limited to situations in which death does not immediately follow the infliction of damage. It is not relevant in this case.

67. The prosecution has the onus of proving each element of the offence beyond reasonable doubt before a finding of guilt can be made. To prove the offence of intentional assault causing death as it is alleged, the prosecution must prove beyond reasonable doubt that

a. The defendant assaulted the deceased; and



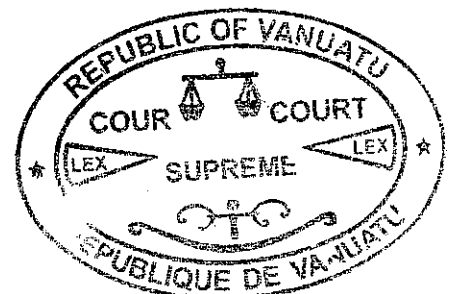
- b. The defendant intended to assault the deceased; and
- c. The deceased's body was damaged by the assault; and
- d. The damage caused by the assault resulted in the deceased's death.

68. In respect of the first 2 elements of the offence, the prosecution must prove the defendant assaulted the body of another person, and that he intended to assault the body of that other person. In respect of the last 2 elements of the offence, the prosecution does not have to prove that the defendant intended to cause the death of the deceased by the assault or even that he was reckless as to whether death would ensue. The prosecution only has to prove the fact of damage and that the damage resulted in the deceased's death: *Public Prosecutor v Ierogen* [2002] VUCA 34.

69. In *Noe v Public Prosecutor* [1989] VUCA 2, a group of 6 to 8 people chased and then assaulted the deceased outside a nightclub. Three in that group were charged and convicted under s 107(d). The appellant Noe tripped the deceased, who fell to the ground. The others kicked him while he was on the ground. He died of his injuries the next day. One of the grounds of appeal against conviction was that there was no evidence that each of the appellants acted in concert with one another in pursuit of a common purpose. It was also argued that there was no evidence as to who effected the fatal blow or blows. The respondent prosecutor submitted that it was not necessary to identify which appellant committed which assault on the deceased – it was sufficient to prove that each appellant took part in an intentional assault, and if death ensued, then each appellant who participated in the intentional assault was guilty of causing the deceased's death. The Court of Appeal said:

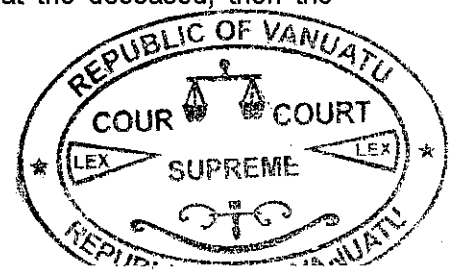
We agree. There is in our view ample evidence, from eyewitnesses and the appellants themselves in their statements that they participated in chasing the deceased outside. They participated in the intentional assault of the deceased by actually physically effecting some blows in the case of the first two appellants, or by aiding and abetting others in chasing the deceased outside and being present and giving encouragement if they did not actually deliver any physical blows such as in the case of the third appellant. We can find no basis for disturbing the finding of the trial judge, and this ground also fails.

70. I now consider whether the prosecution has proved beyond reasonable doubt that the defendant intentionally assaulted the deceased.



*Was there an intentional assault?*

71. In this case, I am satisfied that the prosecution has proved beyond reasonable doubt that the defendant intentionally assaulted the deceased. Three eye witnesses confirmed that they saw the defendant in a group of people armed with spears and stones, approaching, with increasing speed, the 6 or 7 people from Lonbwe; that they saw many in that group throwing stones at the people from Lonbwe; and that they saw the defendant pick up a stone and throw it at the deceased. I heard no evidence that the defendant was not a member of this group. I heard evidence from the witnesses and saw in the video that the 16 members of the group were armed with stones and spears, that they were approaching, together as a group, the 7 men from Lonbwe on the beach, and that one witness heard the group yell, "*we've finally got one*" as they formed a circle around the deceased's body.
72. On the basis of this evidence, I find the defendant was a member of a group of 16 people armed with bamboo spears and stones, who approached with increasing speed the group of 7 men from Lonbwe village who were armed with bows and arrows. I find that many in the group, including the defendant, threw stones at the deceased. I find on the basis of credible and reliable evidence from 3 eyewitnesses that the defendant threw a stone at the deceased and that it hit his head. I find that the defendant assaulted the deceased.
73. I also find that the defendant intended to assault the deceased. It can be inferred from his membership of a group of men armed with stones, spears and knives, a group that was advancing in an organised manner with increasing speed, that he intended to assault the men from Lonbwe, and when a slower moving man got stuck in the sand, intended specifically to assault him.
74. This evidence is consistent with each of the men from Baie Barrier acting in concert with each other, and with there being a common intention to effect an assault on any or all of the men from Lonbwe. Indeed, Bebe said he ran away because he was sure he would be killed if he stayed. I find that each of the men from Baie Barrier including the defendant participated in a joint criminal enterprise by agreeing to assault the men from Lonbwe with the weapons they carried, and that they acted in concert together to execute their intention to assault the men from Lonbwe. As in Noe, all of the men from Baie Barrier participated in the assault regardless of whether or not they delivered any physical blows. I am however left without reasonable doubt that it was the defendant who threw the rock that hit the head of the deceased causing him to fall to the sand.
75. Bong raised the possibility that the defendant was acting in self-defence. He said in his statement to the police that he saw the defendant throw a stone at the deceased, then the



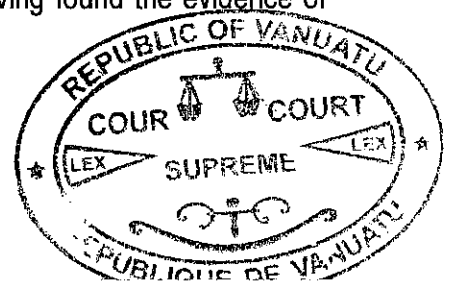


deceased throw a stone at the defendant, but it missed, and then the defendant throw a stone at the deceased, which hit his head. I do not accept Mr Garae's analysis that this means someone else threw the stone that killed the deceased. It is possible that many stones were thrown, some of which missed, some of which hit but did not immediately have an effect, and of course, one that hit and had an immediate effect. This is consistent with the multiple blows recorded in the postmortem findings.

76. Even if the deceased threw the first stone, the circumstances as the defendant believed them to be at the time did not justify throwing a stone at the deceased. The deceased was, by this time, alone on the beach and without the assistance of his companions. He was faced with an assault by 16 people carrying bamboo spears and stones. The defendant had the ability not to retaliate knowing the deceased was outnumbered and out-armed, yet he retaliated anyway. This indicates an excessive and disproportionate use of force, and the subsequent behaviour of the group at the spot where Rob's body lay on the beach indicates their purpose was not self-defence.
77. I also do not accept Mr Garae's submission about some sort of community self-defence. If the Lonbwe people damaged property in Baie Barrier a day or two earlier, that meant the Baie Barrier people had an opportunity not to attack the people from Lonbwe. There was no immediate threat of violence that left no time for an alternative course of action. Inter-village tensions caused by what seems to be too little food for too many people (hence the reason for the namele leaves and their removal) does not provide a lawful excuse to kill, nor does it provide a lawful defence to the charge Mr Benkor faces.

*Was the deceased's body damaged by the assault, and did the damage caused by the assault result in the deceased's death?*

78. The postmortem report and the death certificate record that death was caused by extensive skull fracture due to multiple blunt force injuries to the head. The photograph of the deceased's exhumed head shows a round stone-shaped hole near the top of the skull. Mr Garae submitted that the use of the plural "multiple blunt force injuries" in the postmortem findings means there is no proof of a link between the specific injury that killed the deceased and the stone thrown by the defendant.
79. The shape of the hole in the skull leaves no doubt that it was made by a stone as distinct from the other weapons brought to the beach that day: bamboo spears, bush knives and arrows. The eyewitness accounts indicate that many stones were thrown. It would not be unusual in the circumstances if the deceased was hit by more than one stone. Having found the evidence of



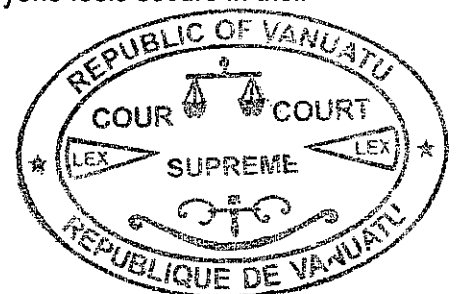
the eyewitnesses to be credible, I am sure that the stone thrown by the defendant, that resulted in the deceased falling to the ground, was the stone that caused the deceased's skull to fracture resulting in his death. Even if I am wrong in that regard, having found the defendant acted in concert with the other men from Baie Barrier to execute their common purpose, either by actually physically throwing stones, or by aiding, abetting and giving encouragement to each other to assault the men from Lonbwe by throwing stones at them, the prosecution has proved beyond reasonable doubt that the stone that fractured the skull of the deceased resulting in his death was thrown by the group that included the defendant, and that the defendant is, as a result, guilty of intentional assault causing the deceased's death.

### Verdict

80. For these reasons, I find the defendant Michel Benkor **guilty** of the intentional assault of Rob Malwajaru, and that the damage caused by the assault resulted in Rob Malwajaru's death.

### What happens after the trial

81. This verdict was delivered by zoom coordinated from a courtroom in Port Vila on Friday 12 July 2024. I was in Wellington, New Zealand; Ms Lunabek the prosecutor and Mr Olul the interpreter were in Port Vila, Efate; Mr Garae the defence counsel was in Luganville, Espiritu Santo; and Mr Benkor was in the Area Administrator's office in Pangji, South Pentecost with his father, his Chief, the Area Administrator and others. They arrived by boat in choppy seas. It would have been preferable for everyone to have been in the same courtroom at the same time, but this trial was notable for how well, and how willing, all of the participants, including the people of Lonbwe and Baie Barrier, were able to adjust and improvise. Their willingness brought justice to South Pentecost without compromising the fundamental rights and freedoms, including fair trial rights, that are enshrined in the Constitution of Vanuatu for the benefit of all the people of Vanuatu.
82. The next stage in this process is the sentencing of Mr Benkor. That will be done after the Probation officer interviews Mr Benkor to find out about his personal circumstances. The Probation officer will file a report that I will take into account, along with submissions from Ms Lunabek and Mr Garae, when I decide what Mr Benkor's sentence will be.
83. Any positive steps taken by Mr Benkor, including a custom reconciliation ceremony, will reduce the sentence, especially if, with the Area Administrator's assistance, the reconciliation involves the chiefs of Lonbwe and Baie Barrier formally resolving to make a lasting peace that involves no more fighting, and formally resolving to make a plan to share, and gradually increase, the production of food so that everyone has enough to eat, and so that everyone feels secure in their homes.



- 84. The sparkling physical beauty, ancient cultures and diverse languages of South Pentecost, are gifts to be respected and treasured and should not be tarnished by any more fighting. The people of Baie Barrier and the people of Lonbwe deserve to have peace.
- 85. I will deliver the sentence on **Friday 4 October 2024 at 11am**. The pre-sentence report is to be filed by 31 August 2024; the prosecution submissions are to be filed by 10 September 2024; and the defence submissions are to be filed by 20 September 2024.

DATED at Port Vila this 12<sup>th</sup> day of July, 2024

BY THE COURT

