

PUBLIC PROSECUTOR

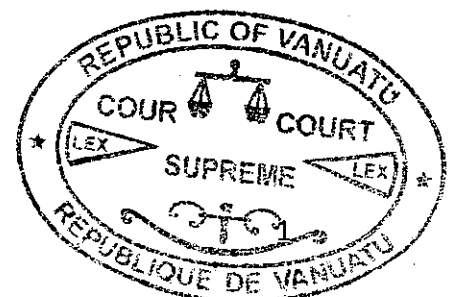
v

WALTER KILMAN

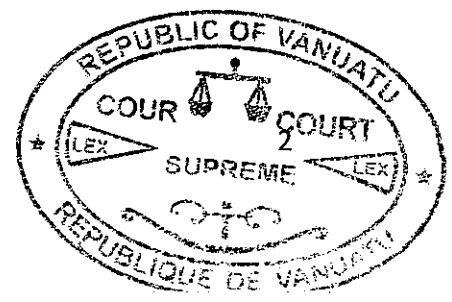
Dates of Trial: 31 July 2024 & 2 August 2024
Before: Justice V.M. Trief
In Attendance: Public Prosecutor – Ms M. Tasso
Defendant – Mr B. Bani
Date of Decision: 2 August 2024

VERDICT

1. The Defendant Walter Kilman pleaded guilty to carrying a firearm in a public place contrary to subs. 29(1), s. 40 and the Schedule of the *Firearms Act* [CAP. 198] (Charge 1) and possession of a firearm without firearm licence contrary to para. 3(a), s. 40 and the Schedule of the *Firearms Act* (Charge 3). He is convicted of those charges on his own pleas and the admitted facts.
2. This matter proceeded to trial as to the charge of possession of firearm with intent to injure contrary to s. 26, s. 40 and the Schedule of the *Firearms Act* (Charge 2) and attempted premeditated intentional homicide contrary to s. 28 and para. 106(1)(b) of the *Penal Code* [CAP. 135] (Charge 4).
3. The Prosecution was required to prove the elements of each offence beyond reasonable doubt:
 - a. Possession of firearm with intent to injure:
 - i) The accused had in his possession a firearm; and

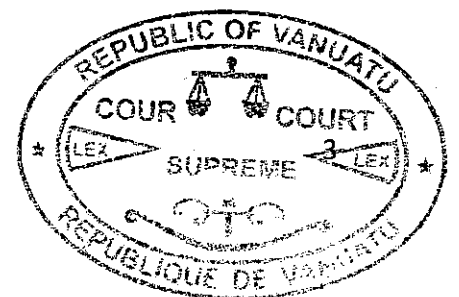


- ii) With intention to endanger human life or cause serious injury to property.
 - b. Attempted premeditated intentional homicide: Namri v Public Prosecutor [2018] VUCA 52 at [22]:
 - i) The accused intended to kill;
 - ii) The intention to kill was formed before the killing (premeditation); and
 - iii) What the accused did was an attempt to intentionally kill.
4. Mr Kilman did not have to prove anything.
5. I did not assess the witnesses solely on their demeanour in the witness box. I also looked for consistency within the witness' account, for consistency between different witnesses' accounts and the inherent likelihood, or not, of the witness' account.
6. The Prosecution called the complainant Mr Randy Kenneth, his wife Mrs Angela Kenneth and his father Mr Aikson Kenneth.
7. Three exhibits were tendered by consent: (i) Mr Kilman's record of interview dated 16 May 2022 morning [**Exhibit P1**]; (ii) Mr Kilman's record of interview dated 16 May 2022 afternoon [**Exhibit P2**]; and a sketch map drawn by the Police [**Exhibit P3**]. Angela Kenneth's statement to the Police was tendered during her cross-examination [**Exhibit P4**].
8. Mr Kilman elected to give evidence in his own defence.
9. The three Prosecution witnesses all stated that on 14 May 2022, the three of them as well as Randy and Angela's 2-year old daughter were at their garden at Senal village at Lakatoro area on Malekula island. Mr Kilman drove by in his green double cabin truck and stopped on the main road next to the garden, swore at Randy ("*Blarry facken bastard. Tedei bae yu kakai kok blo yu, bae yu swim lo shit blo yu.*") and told him to wait there. Mr Kilman then drove to his (Mr Kilman's) house (towards LTC, on the right hand side of the sketch map **Exhibit P3**) then they heard a gunshot from Mr Kilman's house. Not long after that, Mr Kilman returned in his truck, sped past them, drove around the Senal roundabout and returned to stop on the main road next to their garden, with the truck facing towards LTC. Mr Kilman had a 0.22 rifle with him. They said that Mr Kilman swore at Randy, "*Blarry facken bastard. Tedei bae yu kakai kok blo yu, bae yu swim lo shit blo yu. Bae ol man I fraet lo spirit blo yu lo ples ia.*")
10. The Prosecution witnesses' evidence diverged from this point onwards. **Randy Kenneth** and his father **Aikson Kenneth** said that Mr Kilman cocked the gun loudly



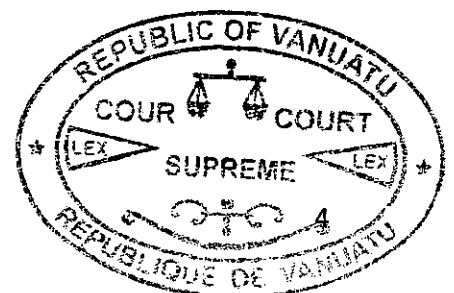
whilst still seated inside the truck and then opened the truck door and came outside. Mr Kilman was 14-15 metres away from where they were standing. Randy stated that the Courtroom the trial was taking place in (Dumbea Courtroom 2) was 10 metres long so add another 5 metres after that was how far apart they and Mr Kilman were. He also said that the land had only a slight elevation, of 1-2 metres. Both Randy and Aikson said that they had cleared the land of all trees, to plant yams, therefore they had a clear view between themselves and Mr Kilman. They said that Mr Kilman swore some more at Randy – who by now was carrying his daughter – then pointed the gun at Randy and shot the gun at Randy. Randy ducked down holding his daughter, then said, 'Let's run!' ("Yumi ron!") and they all ran up the hill to their house. They left behind at the garden their roasted bananas for lunch, wheelbarrow and tools and ran.

11. Randy said that Mr Kilman pointed the gun at him (Randy) but they were all standing near each other so he could not see exactly who the gun was pointing at. Randy said that he felt the bullet fly past him and his daughter. He said that afterwards, he found a bullet casing at the garden then told the Police about it the next day. Randy said that there had been 2 previous occasions that Mr Kilman had had words with him to stop clearing and working on the land where he had made the garden because of an ongoing dispute over the custom ownership of the land.
12. Both Randy Kenneth and Aikson Kenneth were unshaken in cross-examination. Randy said that Mr Kilman pointed the gun up and out the window of the truck when he cocked it. Randy and Atkinson said that after Mr Kilman came out of his truck, he walked 3 metres alongside the truck, heading towards the small track that led into their garden. They both maintained that Mr Kilman pointed the gun at Randy, shot at Randy then they ran up the hill.
13. **Angela Kenneth** said that there was a large mango tree by the roadside and small trees between them and Mr Kilman but that they had a clear view to him. She said that Mr Kilman pointed the gun up towards them and shot at them; she does not know who exactly he was pointing the gun at but he shot the gun! She said that Mr Kilman was walking into the garden and they all ran up the hill. They left everything at the garden and ran. She was very frightened.
14. In cross-examination, Mrs Kenneth said that the distance between them and Mr Kilman was 13-15 metres. She was referred to her Police statement [**Exhibit P4**] and agreed that what she had said in her statement that the distance between them was 13 metres was correct. She also agreed after being referred to **Exhibit P4** that Mr Kilman came out of his truck, then cocked the gun and shot at them.
15. **Mr Kilman** said that in 2016, Randy's family began clearing the land where their garden was located. He asked the Police to tell them to stop but instead the Police

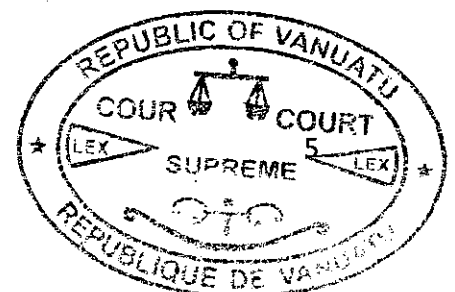


advised Randy's family to file a case in Court. It was only when he was following up the case in 2021 that he found out that that case had been discontinued in March 2021. He again asked the Police to stop them working on that land, but they continued working on the land. He spoke twice with Randy about the land before the incident on 14 May 2022, but they continued to clear and work on the land.

16. He said that on 14 May 2022, he drove to Litzlitz to get coconut seedlings to feed his chickens. When he drove past Randy's garden, he heard people shouting at him. He saw that there were more people there than just Randy, his wife, his father and child but the Prosecution witnesses' evidence was there were just the four of them. They swore at him so he repeated back to them the swears and vulgar language that they hurled at him. Then he left.
17. He said that as he was driving home, and because he had seen the speed at which they were clearing the land, he thought to himself that if he did not do something, they would clear the land up to his family's area. So his thinking was he must threaten them so that they would stop clearing the land. Therefore, when he got home, he put a firecracker atop a Tusker bottle and lit it. It burst making a sound like a gunshot from a 0.22 rifle. In his mind, he thought that Randy and his family would hear that he had shot his 0.22 rifle and they would leave. He stayed another 15-20 minutes at home to give time for them to leave the garden.
18. Mr Kilman said that he had only one bullet left; he put the bullet in his trousers pocket. He drove back to them, sped past, swung around the roundabout (on the bottom left hand side of the sketch map **Exhibit P3**) and then stopped on the main road beside their garden. He wound down the tinted window of his driver's door then opened the door, displaying his gun lying across his lap. Randy saw the gun, picked up his daughter who was playing on the ground and held her with both hands in front of his chest.
19. Mr Kilman said that then he got out of the truck holding the gun, and Randy was saying to him, "Yu go hed, yu go hed" ('Go ahead, go ahead') but he did not know what Randy was meaning. He said that he removed the bullet from his pocket, showed it to them and then cocked the gun. At the same time, he heard someone say, "Yumi ron" ('Let's run') and they started running. He put the bullet in the gun, pointed the gun towards the sky and shot the gun. He said that he did not point the gun at them. Then he placed the gun on the ground and slapped his thighs making a loud sound. After that he laughed and a local baker arrived and spoke to him. He said he was 10-15 metres away from them when he shot the gun. He got back into his truck and returned the gun to his house because he knew that the Police would come to see him. All this happened at lunchtime but the Police did not come to see him until 4.30pm or 5pm that afternoon.

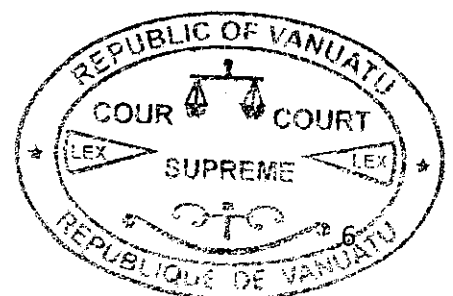


20. He said that every year, he buys 2 or 3 packets of bullets to shoot wild dogs and fowl as there are too many around.
21. Mr Kilman was not shaken by the questioning in cross-examination. He said that he had just one bullet left which is the one he showed to them before inserting it in the gun and firing the single shot. He denied having an intention to shoot and kill Randy. He maintained that he exited the truck then he cocked the gun, and that after that, not one of them saw him shoot in the air because all of them had already started running. He denied pointing the gun at Randy. He said that he wanted only to threaten and frighten them so that they would stop clearing and working on the land. He denied carrying the gun with intent to endanger Randy and his family, or to cause injury to them.
22. In re-examination, Mr Kilman said that he shoots down *nawimba* birds from much further away so if he had wanted to shoot Randy or other family member, he would have succeeded because the 10-15 metres distance is too short and he could not have missed hitting one of them if he had intended to shoot them.
23. There are therefore two competing and diametrically opposed versions. Three witnesses said that Mr Kilman fired his gun at his house; Mr Kilman said that he lit a firecracker to scare them away from the garden. Two witnesses said that Mr Kilman cocked the gun whilst still inside the truck, then exited, pointed the gun at Randy and shot the gun. The other Prosecution witness and Mr Kilman said that he exited the truck *then* cocked the gun. Angela said that he shot the gun at them; Mr Kilman said that he showed them the bullet from his trouser pocket, put it into the gun and then shot up into the air, but no one saw him shoot as they had already starting running away.
24. It is undisputed that on 14 May 2022 at Lakatoro area on Malekula, Mr Kilman had in his possession a firearm, namely a 0.22 rifle. It is also common ground that Mr Kilman swore at and used vulgar language to Randy. In Mr Kilman's evidence, those present at the garden swore at him so he repeated back to them the swears and vulgar language that they hurled at him.
25. The Prosecution submitted that Mr Kilman carrying the gun to the garden and his words showed that he had intention to kill. I consider that it is also plausible that Mr Kilman carried the gun to the garden and said what he said only to threaten Randy and the others and to scare them away, which in his evidence was what he intended.
26. It is accepted that there were 2 previous encounters between Randy and Mr Kilman about the land that they were gardening on. The Prosecution submitted that on 14 May 2022, when they shouted at Mr Kilman from the garden, his anger about the disputed land boiled over and he formed the intention to kill including firing the gun



at his house then at them at the garden. I consider that equally, this part of the evidence is consistent with Mr Kilman's case that he did not intend to kill but only to threaten and scare them so that they would stop working on that land.

27. I consider that at a distance of 13-15 metres as put forward by the Prosecution witnesses (or 10-15 metres, in Mr Kilman's evidence), on largely level land with an elevation of only 1-2 metres, with an unobstructed view as the land had been cleared for a yam garden which requires that all trees be cleared away so that the yams can grow, if Mr Kilman intended to shoot Randy or indeed any of the others, he could not have missed over that short distance. In addition, Randy and the others were all stationary targets. And Randy and Mr Kilman were directly facing each other and talking. I consider that it is inherently unlikely that if Mr Kilman had intended to shoot them with his gun, that he would have missed. It is physically impossible to evade a speeding bullet from a 0.22 rifle – if Mr Kilman had pointed the gun at them with the intention to shoot one or other of them, that person would have been hit and fallen to the ground. I conclude and find therefore that Mr Kilman did not intend to shoot any of them and certainly not to kill them.
28. I also conclude and find that Mr Kilman carried his gun to Randy and family's garden on 14 May 2022 without intent to endanger their lives or cause serious injury to them or their property.
29. Although I find that Mr Kilman did not have intention to kill or to endanger their lives, I accept that Randy, Angela and Aikson went through a terrifying experience caused by Mr Kilman. He approached them with a gun and then shot the gun. Whether he shot at them or up into the air, it was an extremely unpleasant thing for Mr Kilman to do and was undoubtedly very frightening and traumatising for all of them particularly the little girl.
30. At times, there may well be a dispute with another person. However, threatening that person with a gun is not the way to go. Dialogue is the way to solve a problem or dispute. I urge Mr Kilman in the future to use his words in a positive manner, rather than resorting to threats and wielding a weapon, to navigate his way through a dispute or difficult situation that he may encounter so that he does not come before another Court of law on criminal charges and to maintain peace and good order amongst ourselves, the people of the Republic of Vanuatu.
31. The Court is not saying that the events referred to by the Prosecution witnesses never happened but it is saying that the Prosecution has not proved the case to the required standard of beyond reasonable doubt.



32. For the reasons given, I return verdicts of not guilty in respect of Charges 2 and 4. Mr Kilman is deemed to be innocent of those charges and is acquitted.

**DATED at Port Vila this 2nd day of August 2024
BY THE COURT**

VM Trief

Justice Viran Molisa Trief

