

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Criminal Appellate Jurisdiction)

Criminal Appeal
Case No. 18/562 CoA/CRMA

**BETWEEN: JONATHAN SESIL
ANSEN DAVID
ANTHONY LOUGHMAN
SAMUEL SULI
MATTIEN DAN
TARI WAKO
BEN ROY
KENNY KARSAM**

Appellants

AND: THE PUBLIC PROSECUTOR

Respondent

Coram:

*Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Oliver A. Saksak
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens*

Counsel:

*D. Yawha and J. Kaukare for the Appellants
B. Ngwele for the Public Prosecutor*

Date of Hearing:

Wednesday 18th April, 2018

Date of Reasons for Judgment:

Friday 27th April, 2018

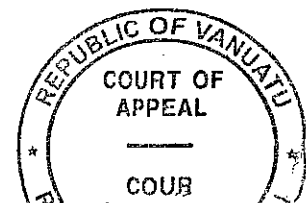
REASONS FOR JUDGMENT

1. The criminal trial of these appellants followed the destruction by fire on 18th July 2015 of substantial parts of the Tanna Beach Lodge at Lenami Tanna (the Lodge). The appellants, along with seven other defendants named in the information were charged with various offences of Arson and Unlawful Assembly. Each of the present appellants were convicted of one count of unlawful assembly contrary to Section 69 of the Penal Code Act [CAP. 135]. Six of the 8 appellants (those other than Anthony Loughman and Kenny Karsam) were convicted of arson contrary to Section 134(1) of the Penal Code.
2. The appellants appealed against all the convictions on the ground that they are unsafe as the trial judge failed to take into account evidence from the appellants



and other defence witnesses, and in particular evidence from them which identified the actual persons who lit the fires and were assembled at the Lodge for that purpose.

3. At the conclusion of the hearing of the appeal the Court announced that the appeals would be allowed. The Court set aside all the convictions against the appellants, save for the conviction against Mattien Dan for unlawful assembly as he had pleaded guilty to that charge. A retrial was ordered. The appellants were released on bail. We announced that reasons for this decision would be published at a later date. The reasons now follow.
4. It was common ground at trial that on the morning of 18th July 2015 news was received by the relatives of Roger Kamisak that he had been murdered the previous evening, and the rumour was that the son of the proprietor of the Lodge had murdered the victim after a night of drinking and partying. Relatives of the deceased went to the Lapangtang village to share their grief. Chiefs of local nakamals met at the Lapangtang nakamal and were concerned with ascertaining what had happened to the deceased. Tensions grew. Relatives of the deceased wanted to avenge the death.
5. Eighteen defendants stood trial. The prosecution's case was that the defendants agreed to go to the Lodge and burn it down. An angry mob assembled at Lenami cross road near the Lodge. Witnesses saw a huge crowd of angry people heading toward the Lodge with axes, stones and knives. The prosecution alleged that when the defendants reached the Lodge area they split into two groups. One group led by the defendant Rex Tom Kiel moved through the entrance of the Lodge and set fire to a workshop. The other group led by the defendant Jonathan Sesil proceeded down to the beach and then into the area of villas, and members of that group were responsible for setting fire to the villas numbered 6, 7, 8, 9 and 10. The first group included defendants Sam Loa and John Kasis. They were found guilty of the charges against them, and have not appealed. The second group led by Jonathan Sesil, on the prosecution case, included each of the present appellants. Following a four day trial, in written reasons for judgment, the trial judge entered convictions as follows:
 - Anthony Loughman and Kenny Karsam – unlawful assembly
 - Ben Roy and Mattien Dan – arson, villa number 10
 - Tari Waki – arson, villa number 7
 - Jonathan Sesil, Ansen David, Mattien Dan, Samuel Suli and Tari Wako – arson of village number 8
 - Jonathan Sesil, Ansen David, Mattien Dan, Samuel Suli, Tari Wako and Ben Roy – arson of villas number 6 and 9.
6. As we have mentioned Rex Tom Kiel, Sam Loa and John Kasis were found guilty in respect of the arson of the workshop. Seven other defendants who stood trial were not convicted of any offence.



7. The trial judge in his reasons noted that originally an information had been laid against 26 defendants but a fresh information was laid shortly before trial naming only 18 defendants. The judge noted that the evidence suggested that there were probably over 300 people gathered at the Lodge that day, and whilst many were there to see what was going on, there were more young men involved in the mayhem of that day than appeared in court.
8. The reasoning of the trial judge for finding the appellants guilty is summarised in the following paragraphs of the judgment:

"18. The witnesses mentioned all saw the defendants milling around and taking an active part in the arson. The evidence is of one or other of the group running around the area of the bungalows holding coconut leaves, breaking wooden louvres on the windows of the villas, opening doors and throwing molotov cocktails at the villas.

19. There is ample evidence to show this group or members of it went into each Villa. Before they entered there was no fire. Soon after they came out the Villas were seem to be on fire. There is no doubt they were involved in arson.

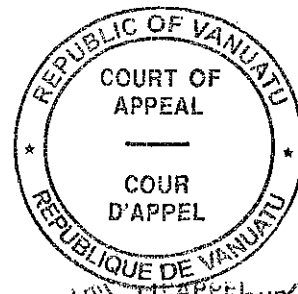
20. There may well have been other young men involved in the arson. It is not for me in this trial to say that. They are not before the Court now but possibly will face charges in the future.

21. All of the defendants who are charged with arson are charged with unlawful assembly. Having accepted that those defendants are, without a shadow of a doubt, guilty of arson they are also guilty of unlawful assembly."

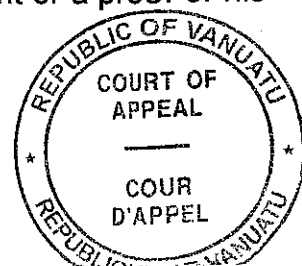
9. The judge said that a number of witnesses, including four that he named, gave evidence about the offences. However neither their evidence, nor the evidence of other prosecution witnesses was summarised or discussed. Apart from a reference to the evidence of Anthony Loughman set out below, the trial judge's reasons make no reference to the defence case, or to the sworn evidence of each of the appellants and of other witnesses. In total there were 13 witnesses called in the defence case.

10. Anthony Loughman gave evidence in his own defence. Of his evidence the judge said:

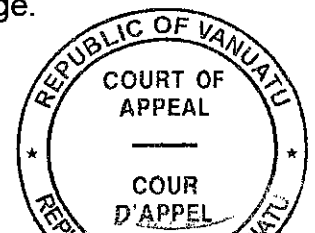
"Anthony Loughman was seen by several witnesses moving around with the group (the appellants). He was seen using his mobile phone to take photographs. He says that was all he was doing. I do not accept that. In his evidence he said he only took 3 photographs. This is not the action of someone trying to record the whole event. This is the action of someone who was part of the unlawful assembly who, fortunately for him, did not or was not seen to take any active step in setting the villas alight."



11. Each of the defendants gave sworn evidence in his defence. Each denied setting fire to any of the villas. Halfway through the trial Mattien Dan pleaded guilty to the charge of unlawful assembly. His plea is not recorded in the judgment. In his evidence Mattien Dan identified another group of young men as the arsonists, that being a group of 5 identified people led by Lawa lau. He said they had proceeded from Lapangtang village to the Lenami crossroad with a container of fuel, and that Lawa lau was dictating the movement of his group and other followers towards the Lodge and shouting that there were custom orders authorised by the chiefs to burn the Lodge. He gave evidence that at one point the Lawa lau group poured inflammable liquid into smaller containers, a fact corroborated by the appellant, Ansen David in his evidence. The appellants Jonathan Sesil and Ansen David gave similar evidence that it was a group led by Lawa lau that was responsible for setting fire to the villas. Their evidence was that whilst they were within the large group of people milling about the Lodge as fires occurred, they were followers watching events, not the perpetrators of the fires.
12. Tom Hiwa was another defence witness. He said he was the chief of the Lawa lau mob. He had been at church on the morning of the fire and as he emerged from church he saw smoke and went down to the main road where he saw Ansen David and Jonathan Sesil approaching and then took a route towards the beach. Tom Hiwa climbed a vantage point on the opposite side of the main road, and looked down over the Lodge. Many people were running around, and he recognised Lawa lau and another within that group. He went home and was then approached by Lawa lau and the other four young men in his group. They told him they did "*the sniper job*" indicating their responsibility for the fires. At this point in his evidence the judge intervened and ruled that further conversation between Lawa lau and Tom Hiwa was hearsay. Tom Hiwa went on to say that he subsequently took Lawa lau from Tanna to Vila where they met first with a prosecutor from the Public Prosecutor's Office for the purpose of Lawa lau confessing to his role. The prosecutor then drove them to the police station where they met with police officer Arlee. Tom Hiwa observed Lawa lau being interviewed by that officer. The inference from Tom Hiwa's evidence is that Lawa lau confessed the role of his group as the arsonists. Initially Lawa lau was one of the defendants in the information laid by the Public Prosecutor but his name was omitted from the fresh information filed shortly before the trial.
13. The fresh information was brought to the attention of the appellants and their counsel only on the morning of trial. No explanation was offered by the prosecutor at the trial as to why Lawa lau was no longer a named defendant. From the bar table we were told by counsel for the respondent that the prosecution had intended at trial to call Lawa lau as witness, but when the trial came on he was not available. No copy of his police statement or a proof of his intended evidence was given to the appellants.



14. None of the defence evidence was referred to by the trial judge in his judgment. The respondent, in written submissions to this Court, has very fairly and properly informed the court that the prosecutor considered "*the evidence from all the appellants were detailed and convincing*".
15. The trial judge refers to the situation at the Lodge at the time of the fires as "*mayhem*". The picture given by the evidence fully supports that description. There were many people milling about. There was tension, there was much movement, and there was smoke that would affect visibility. In these circumstances identification would be rendered difficult. In such a case there was a need for the trial judge to have regard to the customary warning about the risks of error in identification but there is no statement about these risks in the reasons for judgment.
16. Recognising that risk, and having regard to the denials made by the appellants, and the extent to which the evidence about the role of Lawa lau was corroborated by the chief of that group, analysis of the defendants' evidence and a comparison of it with the prosecution evidence could have been expected. At the very least, it was incumbent upon the trial judge to give reasons why the sworn evidence of the defendants was to be totally rejected.
17. Counsel for the respondent sought to uphold the decision by contending that it was open to the trial judge to reject the appellants' evidence as blatant lies. Whilst that is so, reasons for the rejection of the appellants' evidence were necessary.
18. In the absence of any reference to or consideration of the appellants' evidence we consider that the verdicts both on the arson charges and on the unlawful assembly charges are unsafe and should be quashed. Even on the unlawful assembly charges, whilst there is ample evidence that the appellants were present in the area whilst the mayhem was taking place, it was necessary for the prosecution to prove beyond reasonable doubt that the appellants were there with intent to commit an offence or to engage in the common purpose of others to commit an offence. The appellants in their evidence denied that intent and in the absence of reasons why their evidence should be rejected the convictions on that a lesser charge must be quashed.
19. In the case of Anthony Loughman, the trial judge did refer to his evidence, and he rejected it for the reasons earlier set out. There was additional evidence led in Anthony Loughman's defence that could support his denial of any intent to be engaged in the unlawful activities that were the purpose of other members of the assembled mob. The photographs which he took were shown to a police officer but the police officer, he admits in error, omitted to take and retain copies of them. The subject of those photographs it is contended would have supported Anthony Loughman's case. That evidence is not discussed by the trial judge.



20. In our opinion the reasons given by the trial judge do not provide a sound basis for rejecting his evidence. We consider the finding of guilt against him on the charge of unlawful assembly is also unsafe and should be quashed.
21. Counsel for the appellants contends that the appellants were prejudiced by the very late service upon them of the new information which omitted Lawa lau as a defendant. They treated his anticipated presence at the trial as important to the presentation of their case. Absent both Lawa lau, and a copy of his police statement or witness proof counsel contends that the trial process was rendered unfair. Without more evidence about the circumstances surrounding the laying of the fresh information, and evidence identifying how the alleged prejudice impacted on the presentation of the appellants' case it is not possible to reach conclusion whether the trial process was rendered unfair to the appellants. As we consider the convictions against the appellants must in any event be quashed, there is no need for this aspect of the appellants' submissions to be further considered.
22. For these reasons the appeal was allowed and the convictions were thereupon quashed.

DATED at Port Vila, this 27th day of April, 2018.

BY THE COURT



Hon. Vincent Lunabek
Chief Justice.

