

**PUBLIC PROSECUTOR -v- JACK NALAU**

**Coram:** *Chief Justice Vincent Lunabek*

**Counsel:** *Mr Bernard Standish for the Public Prosecutor  
Mr Jacob Kausiama, Public Solicitor for the Defendant*

**JUDGMENT ON VERDICT**

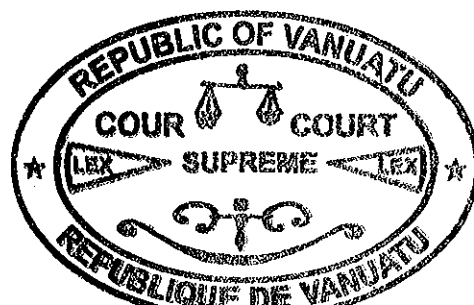
**I – INTRODUCTION**

This is the Judgment in this case. The accused, Jack Nalau, was charged with two (2) counts of Premeditated Intentional Homicide, contrary to section 106(1)(b) (in counts 1 and 3), two (2) counts of Intentional Homicide (in the alternative to the Premeditated Intentional Homicide counts), contrary to section 106(1)(a) (in counts 2 and 4) and one (1) count of Unlawful Entry of Dwelling House, contrary to section 143(1) of the Penal Code Act [CAP.135]. The Accused pleaded not guilty to all counts.

Section 81 of the Criminal Procedure Code Act [CAP.136] was read and explained to the accused. The Accused understood his rights thereunder. The Accused stood trial in the Supreme Court and the trial proceeded on that basis.

**II - BURDEN OF PROOF**

This is a criminal trial. As in every criminal trial, the law is that the prosecution has the duty to prove each and all essential elements of the offence beyond a reasonable doubt against the Accused. The Accused is not required to prove his innocence. If the Accused has to give evidence himself or call other person to give evidence on his



behalf, I must consider his evidence and the evidence of his witnesses on equal basis as any evidence of the prosecution.

The onus or burden of proving guilt of the accused person beyond a reasonable doubt rests upon the prosecution and it never shifts. The prosecution must prove beyond reasonable doubt that the accused person is guilty of the offence which he is charged before he can be convicted. If I have a reasonable doubt as to whether the accused committed the offence charged against him, it is my duty to give the accused the benefit of the doubt and to find him not guilty on one or all counts of the charge.

Proof beyond a reasonable doubt has been achieved when I as a judge of fact feel sure of the guilt of the accused. It is that degree of proof which convinces the mind and satisfies the conscience so that I as a conscientious judge of fact feel bound or impelled to act upon it. Conversely, when the evidence I have heard leave me as a responsible judge of fact with some lingering or nagging doubt with respect to the proof of some essential elements of the offence with which the accused is charged so that I am unable to say to myself that the prosecution has proven the guilt of the accused beyond a reasonable doubt as I have defined these words, then, it is my duty to acquit the accused. If I believe the accused and he did not commit the offence or what he did lacks some essential elements of the offence or if the evidence of the accused either standing alone or taking together with all of the other evidence leave me in a state of reasonable doubt I must acquit him. But if upon consideration of all of the evidence taken together at the end of the trial, the arguments of counsel and the charge I am satisfied that the accused has been proven guilty beyond a reasonable doubt as I have defined these words above, it is my duty to convict the accused. I must say that it is rarely possible to prove anything with absolute certainty. So the proof or the burden of proof on the prosecution is only to prove guilt beyond a reasonable doubt. When I speak of reasonable doubt I use the words in their ordinary natural meaning, not as a legal term having some special connotation. A reasonable doubt is an honest and fair doubt based on reason and common sense. It is a real doubt, not an imaginary or fanciful doubt which might be conceived by an irresponsible judge of fact to avoid his or her plain duty. This is emphasized by Section 8 of the Penal Code Act [CAP.135] in these terms:-



"8.(1) No person shall be convicted of any criminal offence unless the prosecution shall prove his guilt according to the law beyond reasonable doubt by means of evidence properly admitted; the determination of proof of guilt beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous.

(2) In determining whether a person has committed a criminal offence, the Court shall consider the particular circumstances of the case and shall not be legally bound to infer that he intended or foresaw the natural or probable consequences of his action.

(3) If the prosecution has not proved the guilt of the accused, he shall be deemed to be innocent of the charge and shall be acquitted forthwith."

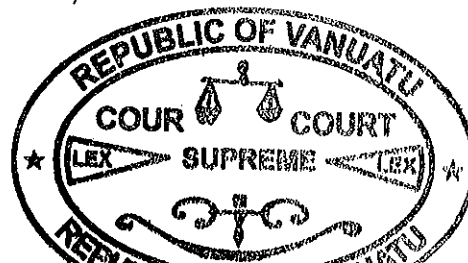
### III – ELEMENTS OF THE OFFENCES

#### ▪ Offences of Intentional Homicide

Before the accused can be found guilty of the offences of Intentional Homicide charged against him in this trial, the prosecution must proof beyond reasonable doubt, the following elements:

1. That there was a dead of a person.
2. That it was the Accused who caused the death or was a principal party in the causing of the death of a person.
3. That the death was caused as a result of an unlawful act; i.e. not as a result of an accident or in reasonable self defence or in reasonable defence of another; and finally.
4. That it was a premeditated act, in the sense that before the unlawful act of killing was carried out by the accused, he had decided to make a homicidal attack upon the two deceaseds, that is the same as saying that prior to killing unlawfully, he had formed the intention to kill them.

If the prosecution should fail to prove anyone of the elements in 1, 2 or 3 beyond reasonable doubt, then the accused would be entitled to be acquitted of this charge altogether. If they prove elements 1, 2 and 3 but fail to prove the 4<sup>th</sup> element, namely premeditation as defined, then the accused could be convicted



of the lesser offences under Section 106(1)(a) as charged in counts 2 and 4. But if the prosecution prove also the 4<sup>th</sup> element as defined above, then the accused could be convicted of Premeditated Intentional Homicide under section 106(1)(b) as charged in counts 1 and 3.

- With respect to the offence of unlawful entry of a dwelling house, the prosecution must prove the following elements, before the accused could be convicted:
  1. The accused entered into a building;
  2. The building was used for human habitation; and
  3. At the time he entered the dwelling, the accused has an intention to commit an offence inside the dwelling.

#### **IV - ISSUES**

This case is about forensic evidence. In the present case, there is no dispute that offences of intentional homicide and unlawful entry of a dwelling house were committed, by some person (or persons). The only dispute is as to the identity of the offender (or offenders) and, to a lesser extent, whether the offender (or offenders), when committing the intentional homicide, did so with premeditation.

#### **V - THE PROSECUTION CASE**

The prosecution case is based on forensic evidence. On 28 May 2004, Mr Zai Lin ZHU and Mrs Tang MEIYU, a Chinese couple, were found dead in their house, at Port-Vila, Vanuatu. One of their employees tried to call them up but without success. He got assistance from a friend of the deceased couple and so they went in the house and they saw what appeared to be blood and a hand hanging out from under the cover of the bed. So they went and reported the matter to the police.

From the injuries they received, they were killed by someone. Their skull were fractured. The fracture to the skull penetrated into the skull cavity and brain. They received serious injuries on their eyes, neck and other parts of their bodies. Police attended the scene of the crime to examine the scene. Assistance was sought from



Australian Federal Police (A.F.P.). Some forensic officers of A.F.P. attended the scene. Items were recovered from the scene. The fingerprints of the accused, Jack Nalau, were found at the scene of the crime. The fingerprints of the accused were found on the exterior of the deceased's vehicle Toyota Cressida parked outside the house from the passage of the door of the vehicle. The prosecutor says, the accused, Jack Nalau, was in contact with the vehicle.

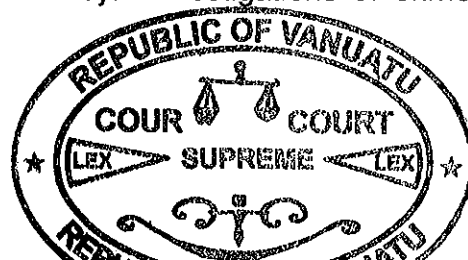
More significant, inside the house of the deceased couple and near the bed of the victims where they lay, fingerprints of accused Jack Nalau was found. A hammer was found at the scene of the crime. It was the weapon used to cause the injuries and the death of the victims. The hammer had blood on it. The fingerprints of the accused were found on the hammer. The blood on the hammer were that of the victims. It was the weapons used to kill the victims. It had the fingerprints of the accused. The prosecution said the accused, Jack Nalau, used the hammer to kill the victims. The prosecution said that it is the forensic evidence that establishes the guilt of the accused, Jack Nalau.

Recently on 24 March 2010, when the accused was in jail, he passed a numeric coded message. The accused asked to pass it to another detainee (Markwin). The coded note was anticipated and translated into bislama. The message indicated, the accused, Jack Nalau, was seeking to obtain some alibi by his friend (Markwin). The prosecution said the significance of it is that the accused is conscious of his guilt of the serious offences.

## **VI - SUMMARY OF PROSECUTION EVIDENCE**

The prosecution called three expert witnesses, police officers and other witnesses. The details of their evidence are contained in the Court record of evidence. What follows is the summary of the relevant part of their evidence on the disputes in the trial.

**Mrs Diana Willie** is a police officer and works for the Vanuatu Police Force for 32 years. She was attached to the Police Crime Scene Unit. She was involved in many serious crime cases. She was involved in major investigations of crime scene on

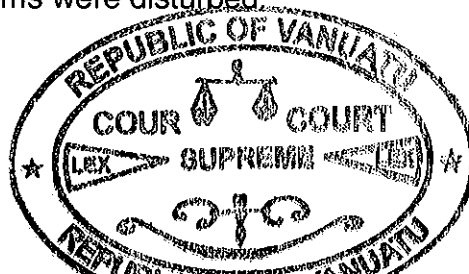


homicide cases. She was involved in the investigation of the present case. She received the report of the case at 1.30pm o'clock on 28 May 2004. She said they were outside the house of the victims. She said the two (2) forensic officers will be arriving from Santo in the afternoon. At 6.25pm the two (2) forensic officers asked her with Inspector Songi to help with the bodies of the couple victims. She did not find anything. She did not take any photographs. Esrom Molisa took photographs of the crime scene. She did not see the photos. She said officer Molisa is no longer working. Officer Molisa was early retired due to the injuries he received during the plane crash. She was not involved in the finger prints. I have seen and heard this witness. Her evidence is not challenged. She is a trustworthy and credible witness.

**Mr Thomas Christian Stoewer** gave evidence. He was a former Federal Agent with the Australian Federal Police. On 28 May 2004, he was already in Vanuatu with A.F.P. assisting Vanuatu Police. He gave evidence of his role as Senior Scientific Officer in charge of serious crime investigations. He gave evidence of his training qualifications. He demonstrated that he had expertise in the identification and collection of fingerprints from crime scenes. He worked with A.F.P. from 1998 to 2008, a total of 16 years of experience. He gave evidence in Courts in Australia for more than 100 times.

He prepared a report (Exhibit P6). The report was about his investigations in this case. He was present when police officer Esrom Molisa took photographs of the crime scene. He recognized the photographs taken on the scene and on external side to the scene [Exhibit P7]. He gave evidence that he made reference to series of Items numbered from 1 to 97. He was aware that the photos were on the compact disc. He made reference to the 2 volumes of photos and said the photos are representations of the photos of the crime scene and numbered 1 to 106 in his statement [Exhibit P8(a) and Exhibit P8(b)].

He referred to location and described them. He said the fingerprints were located on the vehicle and in the bed and on the Items inside the house. He explained that the fingerprints were enhanced by fingerprint powder when he examined the crime scene, he looked at the areas when the items were disturbed.



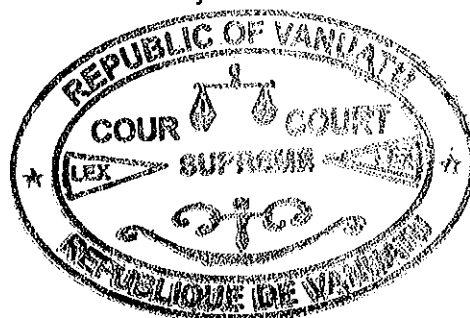
He looked at the items that can hold sufficient details. He looked at the size of the items, the material that retain prints such as shining or smooth material, for example glass, wood, other items need other enhancement. He explained one can see fingerprint on naked eyes but fingerprint is more visible when one used chacol. When one looked for fingerprints, one used white or dark colour print powder.

In this case, he said he used colour print powder. He used sticky tape on the smooth surface to lift powder on the surface. He explained that the technique of lifting is another part of the process. He gave an example of fingerprint found on the motor vehicle. He said item 103 related to motor vehicle and the little square on the side of the vehicle where fingerprint was.

He said it is not his job to identify fingerprints. He said his job is to search and collect fingerprints. He said he is satisfied with all the fingerprints collected from the crime scene.

He gave evidence about the location of the hammer. He said few hammers were located but 1 hammer was located under the counter within the shop. In relation to that particular hammer, there was partial fingerprint on the hammer. He sent the hammer to Australia for examination. He was present during the autopsy process and the photos taken by police officer Esrom Molisa were shown to him and when he saw the bodies of the victims, he said the possible cause of death, was that the victims suffered sever blows caused by heavy objects and the injuries were inflicted by someone. He said the autopsy confirmed his original theory. There were also burns marks on the bodies. The autopsy confirmed his theory with cigarettes burns.

The post mortem revealed that the deceased male had on the broad side of the neck 8-12mm of layer skin. The female deceased had a 6-7mm circular of the size of nose and on the chest of 7mm. He conducted the examination around the house and found cigarettes butts. He located cigarettes butts of Peter Jackson brand of 7-8mm width. He said the cigarettes could have caused these injuries.



The autopsy showed the male deceased received also 2 blows on the eyes and in front head. The size of the hammer is 30 millimeters.

He further gave evidence on the partial fingerprint located in the bed. He said he noticed the bed base and on closure examination, he reached the details. He conducted fingerprint and developed partial fingerprints. He took photos to the fingerprints. He demonstrated this by using Exhibit P8(b). He said this was the bed base after he dismantled the bed. He showed the location of the new mark-

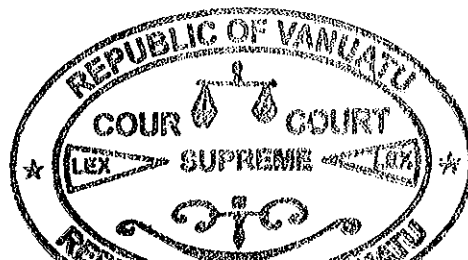
- photo 124 – showed medium short of bed location
- photo 125 – showed little bid closure
- photo 126 – showed partial fingerprints developed.

He said also that there were protocols with A.F.P. Once items returned to Australia, they were stored in secured storages. He confirmed in his evidence that as to the location of fingerprints, he saw fingerprints in the car, bed and on the hammer.

He also explained how blood samples are identified and in a case such as this, quite a number of blood samples will be taken. Some area will be photographed, treated and protected. That is where blood items were sealed and placed with notes.

The purpose of blood sample is to identify whether the samples found were the blood of the two (2) deceased victims and also whether there was blood of others. If a third party was also injured and to identify further evidence and to marry up with other samples.

He gave evidence of the blood stained on the hammer and he gave an opinion that the location of the hammer gave strong evidence of connection of the hammer with the crime. The location of the hammer and the blood stain found on the handle of the hammer were consistent with the crime. He reinforced again that as to the fingerprints, his role is to collect the items of fingerprints and it is not his role to identify the person whose blood was on the items of the fingerprints. This witness was cross-examined. He clarified the terms he used in his report. He said in his field of work, they classify fingerprints as a full contact or a partial contact. Partial contact





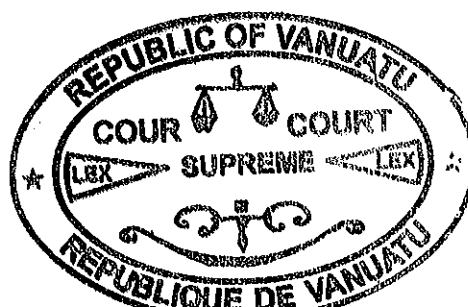
is in the sense that it is partial with that finger. He was asked and he confirmed the collection of fingerprints items from the surface remains the same and there is no distortion occurring.

I have seen, heard and observed Thomas Christian Stoewer in the witness box. He has demonstrated that he had expertise in the search and collection of fingerprints from the crime scenes. In the present case, his evidence that he identified and collected a number of fingerprints from inside and around the dwelling home occupied by the two victims, in and around the areas where their dead bodies were discovered, were unchallenged nor uncontroverted. Mr Thomas Christian Stoewer is a creditworthy and powerful witness.

**Police officer Jack Weller** gave evidence that he works as a police officer for 18 years with Vanuatu Police Force. He worked in the Police Criminal Records Office dealing with fingerprints. He knew the accused, Jack Nalau and identified him in Court. He gave evidence that he took fingerprints of the accused, Jack Nalau, on 4 June 2006 at 9.00am o'clock which were sent to Australia for examination. He confirmed in his cross-examination, the fingerprints he took from the accused were in relation to a different case. In 2004, when the present case was reported, he was not at the crime scene. Witness Jack Weller was a trustworthy and creditworthy witness.

**Ms Lissa Dinning** gave evidence in this matter on 14 June 2010. At the material time, she was working for Australian Federal Police as a fingerprint expert. She was assigned to this particular job, in the present case, to treat fingerprints exhibits and to make comparisons. In this case, she had prepared a statement and report dated 14 July 2006 (Exhibit P1). Ms Dinning outlined her qualifications as follows:

- Bachelor of Science degree (1992) (University of Adelaide), South Australia;
- Diploma in Forensic Investigation (Fingerprint identification) (Canberra Institute of Technology – May 2006);
- Successfully completed the requirements for the Australasian Forensic Field Sciences Accreditation Board (AFFSA) Certificate of Expertise in Fingerprint Science (June 2006).



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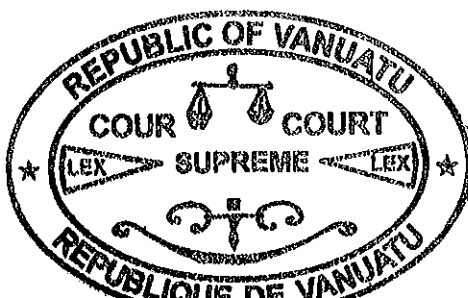
In addition, she attended many other courses in different areas of fingerprints some of which required her to get set examinations. The details of her experience and courses are set out at page 2 of her statement. She gave evidence before the Courts in Australia on matters of fingerprints (and she said eight (8) times).

She explained the origin of the case file, the documentations, photographs and images of the incidents. She obtained Fingerprints Forms submitted by Vanuatu Police Force for comparison. She said she had chemically treated a number of exhibits submitted to Forensic Services case reference number: FN040911. She said page 3 of her report showed the Exhibits items retrieved on 4 June 2004 with the numbers of items and descriptions. Page 4 of her report showed the Examinations and the results she had done on the items of exhibits.

She had treated the Exhibits and she found fingerprints on following items 16B; 37; 17F and 36. She photographically recorded them (with a labeling for each items) as contained at page 4 of her Report in Table 2.1 which was reproduced below:

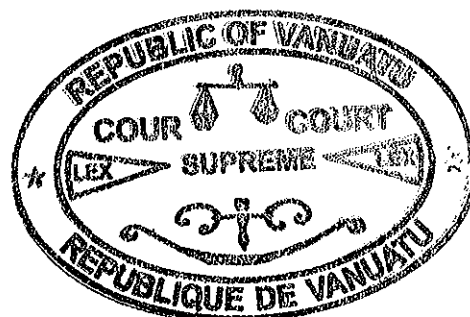
Table 2.1 below indicates the fingerprints which were developed and photographically recorded.

<b>Table 2.1: Fingerprints Located on Exhibits</b>		
<b>Item</b>	<b>Item Description</b>	<b>Prints located and labelled</b>
16 B	National Bank of Vanuatu document, dated 17-Mar-04	023676
37	Hammer with wooden handle	023677 and 023678, 64853 to 64855 inclusive
17 F	Cellophane wrapping of Empty packet of Peter Jackson-Virginia Cigarettes which had writing on lid: "1 6 D..."	023679
36	Hammer with wooden handle. Blood on hammer	64846 to 64852 inclusive



She further said she proceeded to compare the unidentified latent fingerprints in the Forensic Service Case File number FN0919 which was referred to in Table 2.1 referred to above with the fingerprint forms/samples of nominated persons listed at page 4 of her Report. One of the nominated persons was the accused, Jack Nalau. She said she produced the results of her examinations and comparisons at pages 5-6 of her Report. In relation to this case, she said Item 36 was the hammer which had blood on it. She asked a biologist to make the test of blood. She said the blood test was positive indicating that there was the presence of blood. She said she had identified fingerprints submitted from the crime scene located on a bed frame on upper side. She said she identified the fingerprint of the accused, Jack Nalau. She explained that she first examined and treated the fingerprint. She found on the hammer and the fingerprint on the bed from 2004. At that stage, she said she was not aware as to whose fingerprints were on the hammer and the bed frame. She explained that in 2006, more fingerprints were sent for further comparison by Vanuatu Police Force. She remembered fingerprints of Ben Jack and Jack Nalau were sent for further comparisons. She said further that the comparison was done by another and fingerprints of the accused, Jack Nalau, was found. The fingerprints of the accused were verified and checked by 2 other officers. She confirmed that 3 different Fingerprints Experts and 1 technician confirmed the fingerprints of the accused, Jack Nalau. She said experts treated the object with powder. If fingerprints were found, they used clip to remove fingerprints. Black powder after treatment on object put on a white colour. So experts have evidence on a tape lift ready for sending in for analysis in the laboratories.

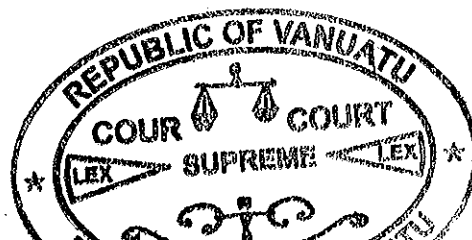
She gave evidence that fingerprints are unique. They are permanent and unchanging. She explained if one picked up a glass of water, one left on the glass fingerprint. Even twins have different fingerprints, she said. Fingerprints were used since 1800. Fingerprints were established for the first time in Argentina in 1891. Fingerprints were used in Australia and England since 1901. She confirmed that the identification of fingerprints as evidence of the crime, was accepted by the Courts.



In this case, during her examination and identification of fingerprints, she used light to show different colour. There were series of steps to treat fingerprints. The last treatment she used to identify fingerprints was chemical which will become of blue colour. She then took photographs of the fingerprints. There were cases of fingerprints placed on objects. For this to happen, she explained the person whose fingerprints were found, might be on the crime scene. In this case, as far as she was concerned, the fingerprints of the accused, Jack Nalau, were genuine. In this case, she identified fingerprints of the accused, Jack Nalau, on the hammer, bed base and on the vehicle. She referred to the results of fingerprints examination and comparisons in her report of 14 July 2006 (at pages 5-6). The details results of fingerprints examination and comparisons contained in Table 2.2 (pages 5-6) are reproduced below:

The results of these latent fingerprint examinations and comparisons have been listed in Table 2.2 below.

<b>Latent Fingerprint</b>	<b>Item Number</b>	<b>Location of Latent Fingerprint</b>	<b>Result</b>
158209 - 1	From crime scene	Exterior of rear passenger side window of vehicle	<b>Left Ring finger Jack NALAU</b>
158209 - 2	From crime scene	Exterior of rear passenger side window of vehicle	<b>Left Middle finger Jack NALAU</b>
158209 - 3	From crime scene	Exterior of rear passenger side window of vehicle	Insufficient
158210	From crime scene	Exterior of front passenger door of vehicle	<b>Left Palm Jack NALAU</b>
158211	From crime scene	Rear passenger side panel of vehicle	Not identified
158212	From crime scene	Exterior of front passenger door of vehicle	Insufficient
158213 - 1	From crime scene	Bonnet of vehicle	Not identified
158213 - 2	From crime scene	Bonnet of vehicle	Insufficient
158213 - 3	From crime scene	Bonnet of vehicle	Insufficient

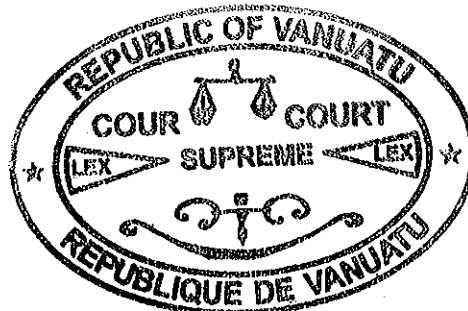


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158214	From crime scene	Exterior 'C' pillar of driver side of vehicle	Not identified
158215	From crime scene	Exterior 'C' pillar of driver side of vehicle	Not identified
158216	From crime scene	Rear side panel of driver side of vehicle	Not identified
158220	From crime scene	Packet of matches from float container	Not identified
158229 - 1	From crime scene	Bed base, upper rung	<b>Right Middle finger</b>
158229 - 2	From crime scene	Bed base, upper rung	<b>Right Ring finger Jack NALAU</b>
158229 - 3	From crime scene	Bed base, upper rung	<b>Right Little finger Jack NALAU</b>
023676	Item 16B	National Bank of Vanuatu document, dated 17-Mar-04	Not identified

Table 2.2 continued...

<b>Latent Fingerprint</b>	<b>Item Number</b>	<b>Location of Latent Fingerprint</b>	<b>Result</b>
023678	Item 37	Hammer with wooden handle	Insufficient
023679	Item 17 F	Cellophane wrapping of Empty packet of Peter Jackson-Virginia Cigarettes which had writing on	Insufficient
64846	Item 36	Hammer with wooden handle. Blood on hammer	<b>Right Ring finger - 2' joint area Jack NALAU</b>
64847	Item 36	Hammer with wooden handle. Blood on hammer	Not identified
64848	Item 36	Hammer with wooden handle. Blood on hammer	Insufficient
64849	Item 36	Hammer with wooden handle. Blood on hammer	Insufficient

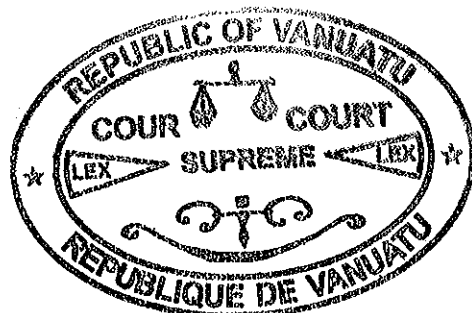


64850 Same fingerprint as 64848 but after subsequent chemical treatment a new label had to be used	Item 36	Hammer with wooden handle. Blood on hammer	<b>Right Ring finger - Jack NALAU</b>
64851	Item 36	Hammer with wooden handle. Blood on hammer	Insufficient
64852	Item 36	Hammer with wooden handle. Blood on hammer	Insufficient
64853	Item 37	Hammer with wooden handle	Not identified
64854	Item 37	Hammer with wooden handle	Insufficient
64855	Item 37	Hammer with wooden handle	Insufficient

Ms Lissa Dinning was cross-examined. She was not present at the crime scene. She identified and compared fingerprints from Exhibits sent to Forensic Services in Canberra, Australia. She confirmed that in this case, the hammer was sent for fingerprint identification and comparison. She said she had located other fingerprints on the hammer but they were not sufficient for identification and so after her first treatment, she thought that the fingerprints were not in blood.

She confirmed, fingerprints were sent to her earlier and that she also received fingerprints after the first ones from Vanuatu Police Force. When she was asked, how fingerprints were conclusive, she responded, they were certain.

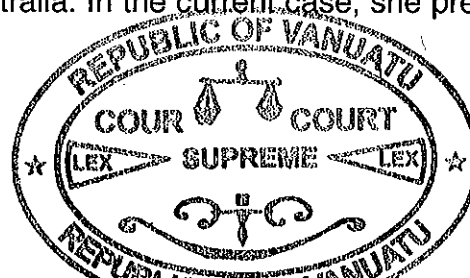
Ms Lissa Dinning clarified in her re-examination the tests she used in identifying and comparing fingerprints. She said she used a whole range of treatments. In this case, she had located 2 fingerprints No.64846 and 64847. Fingerprint 64846 reacted immediately because it had blood on it. The significance of that was that fingerprints No.64847 was not made in blood. She said fingerprint 64846 showed that there was blood in the hand and on the hammer. She tendered the document (Exhibit P3).



I have heard, listened, observed Ms Dinning during her evidence in the witness box, I believe and accept Ms Dinning testimony that the fingerprints of all persons are unique to that person. This means that no two sets of fingerprints are identical (not even as between identical twins). She was definite about this fact and there was no challenge to her evidence, nor any evidence led to contradict her evidence on this point. Ms Dinning is a creditworthy and powerful witness.

**Senior Police Officer Delphine May Vuti** of the Vanuatu Police Force gave evidence that she is a Senior Investigation Officer at the police station in Port-Vila. She worked as an officer of Vanuatu Police for 30 years. For a period of time, she was responsible for the investigation in the present case. She had authorized the fingerprints to be taken at the crime scene for examination in Australia in 2004. In 2006, she received information from Australian Police that some fingerprints were identified and after comparison, were positive. So after she had received positive classification in October 2006, she interviewed the accused, Jack Nalau, particularly in relation to the evidence that his fingerprints were located at the crime scene. She tendered the records of interview as Exhibit P5. The accused, Jack Nalau, declined to answer questions put on him as to how his fingerprints were left at the crime scene and, most particularly, on the bloodied hammer. Police Officer Delphine Vuti is a creditworthy witness.

**Ms Shelley Fountain**, a Forensic Biologist, employed by the Australian Federal Police, testified as to the significance of DNA comparison and analysis. She has produced a report (Exhibit P11) and records of the buccal swab taken by Delphine May Vuti of the Accused (Exhibit P12) and blood samples of the two victims (Exhibit P13). She gave evidence of her qualifications. She held the degrees of Bachelor of Science, majoring in Biochemistry and Genetics from the University of Sydney (1992) with Honours from the Australian National University (1993). Since her commencement in October 1998, she has undergone extensive training in the areas of biological examination, serology, DNA analysis and DNA interpretation. She conducted numerous biological examinations and managed a large number of forensic investigations. She gave evidence before on the significance of DNA comparison and analysis in the Courts in Australia. In the current case, she prepared

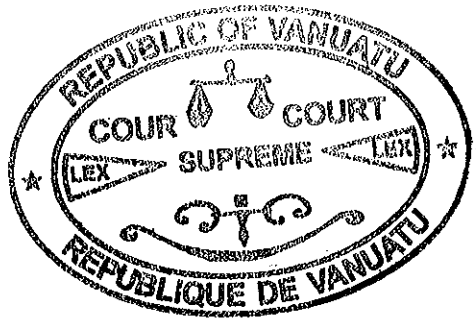



her statement and her report accurately as evidence of her findings she would be prepared to give in Court as a witness.

She described DNA as a complex molecule found in all living cells and is the material that provides the genetic code that determines each person's individual characteristics. There are two types of DNA present in every cell: nuclear DNA and mitochondrial DNA (mt DNA). DNA analysis conducted by the AFP is only conducted on nuclear DNA and utilizes non-coding DNA (with the exception of amelogeniu locus which is a marker for gender). DNA within an individual is the same from tissue to tissue (i.e. blood, semen or buccal samples) and is useful tool in the identification of individuals as it is different in each individual (except in identical twins/triplets, etc.).

DNA can be divided into four distinct stages. These are (i) Extraction, (ii) Quantification, (iii) Amplification and (iv) Analysis via dectrophoresis. DNA extraction is the release of the DNA from the nucleus of the cell so that it can be profiled. Once this is done, the amount of DNA present may be determined in a quantification step. Amplification is performed using the Polymerase Chain Reaction (PCR). During PCR, many copies are made of the specific sections (loci) of DNA that will be used to determine the DNA profile. The Australian Federal Police (AFP) uses the Applied Biosystems (ABI) AmpF/STR Profiler kit to amplify 10 specific STR (short Tandem Repeat) loci [Amelogeniu, a gender marker that differentiates male and female samples and of other regions]. The regions targeted by the profiler plus test are a particular type of locus known as short tandem repeats (or STRs). STRs are highly variable and this is the principle reason they have been selected for forensic use.

As an example, DNA profiles obtained in the crime scene, will be compared with DNA profiles obtained from individuals. If there is a match, then a statistical weighting for this match can be calculated. Two types of statistical analyses are calculated: one single donor and the second to a DNA profile from a mixed source. The statistical calculations for both mixed and single source samples are expressed as likelihood ratios (LRs).



16 



In the present case, she was provided with swabs taken from the accused, Jack Nalau. She had also prepared DNA materials of the two victims. She was further provided with several Ni-Vanuatu and Chinese DNA base materials. She was able to identify at various points measurable ratios. DNA can be deposited by blood or contacts DNA (touching) which is not possible to identify with the naked eye. DNA came out of human sweat or transferred from one's hand.

She gave evidence that Item No.19 is a mixed DNA. It was tested and the test revealed the presence of blood. The DNA came from two individuals as major contributors and one third person. The blood came from the two victims as their DNA was of the major contribution while the third individual's DNA could be from blood or sweat. She also gave evidence about all of references provided in this case were excluded except Item 19 at page 11 of her Report. At page 27 of her Report, she reproduced a verbal scale or weighting she applied:

In order to assist with the understanding of the figure (LR) produced, a verbal scale (or weighting) is applied. This verbal scale is reproduced in Table 1 and is taken from Buckelton et al. (2005).

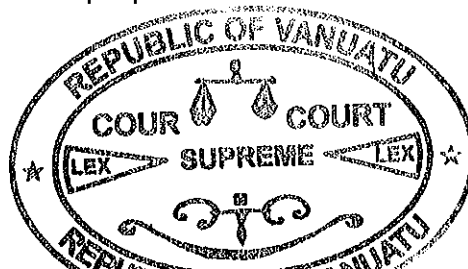
<u>Likelihood Ratio</u>	<u>Verbal wording</u>
$\geq 1,000,000$	Extremely strong
$\geq 100,000$	Very strong
$\geq 10,000$	Strong
$\geq 1000$	Moderately strong
$\geq 100$	Moderate
$\geq 10$	Limited
$\geq 1$	Inconclusive

$\geq$  - greater than or equal to

Table 1 – Verbal Scale

Ms Fountain's conclusions are contained at pages 23-25 of Exhibit P11. Her conclusions were unchallenged and uncontradicted. She was not cross-examined at all. She concluded that her findings:

- Provided extremely strong support for the proposition that it was the blood of



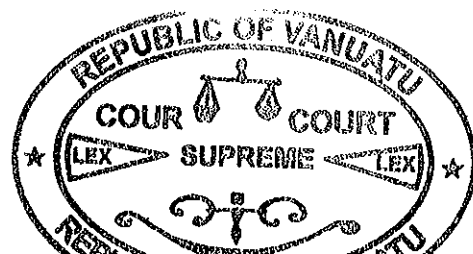
the victim, Tang Meiyu, located in the bloodstains in the doorway entrance of the main bedroom, in the blood marks on the ground below the base of the bed, in the blood spatter at the base of the bed, in the staining on the cardboard box which was located near the eastern wall of the crime scene and on the wooden handled hammer (Exhibit P 11 page 23);

- Provided very strong support for the proposition that it was the blood of the victim, Tang Meiyu, located on another area of the wooden handled hammer (Sample 36E) (Exhibit P 11 page 23);
- Provided strong support for the proposition that it was the blood of the victim, Tang Meiyu, located in the bloodstains in the doorway of the main bedroom and in two swabs of blood marks on the ground below the base of the bed (Exhibit P 11 page 23);
- Provided moderately strong support for the proposition that it was the blood of the victim, Tang Meiyu, in two swabs of blood spatter at the base of the bed on the floor adjacent to the door (Exhibit P 11 page 24);
- Provided extremely strong support for the proposition that it was the blood of the victim, Zhu Zai Lin, in a swab taken from the wooden handled hammer
- (Exhibit P 11 page 24);
- Provided moderately strong support for the proposition that the mixture of
- DNA in the bloodied fingermarks from the bed base upper rung came from both victims Zhu Zai Lin and Tang Meiyu AND from the accused Jack Nalau (Exhibit P 11 page 24).

Ms Fountain is a credible and powerful witness.

**Mr Tom Frank**, a Correctional Officer, gave evidence that on 22 March 2010, he was on duty. The accused, Jack Nalau, gave him a piece of paper to give it to any officer and to pass it to another detainee, Markwin [Exhibit P9]. The papers were just numbers and he gave the paper to his Superior, John Jack George. He did not know what was in the paper. Witness Tom Frank is a genuine and trustworthy witness.

Mr John Jack George, the Principal of the Correctional Services, gave evidence that he was based at prison "High Risk". He knows the accused, Jack Nalau, as a



detainee at the Centre. On 22 March 2010, he was on duty and was in his office when his officer came and gave him a paper with numbers. His officer told him that a detainee wanted him to pass the paper to one of the detainees' friends at the High Risk Section. He took the paper and realized that it was a message. He gave the message to Chris King who worked with the Correctional Services Centre. He said he knew the numbers were messages but he did not understand them. He completed his incident report on the same date. Mr John Jack is a genuine and trustworthy witness.

**Mr Chris King** gave evidence that he was an Advisor of the Correctional Centre for 4 years. He remembered an incident occurring on 22 March 2010. He said he knew of the accused as he saw his name on various documents. On 22 March 2010, he was aware of a coded message from John Jack George. John Jack George asked if he could help with the coded message (Exhibit P9).

The code consisted of numeric figures 1, 2, 3 and he conducted searches at Internet. The code is a sophisticated code called Trifet code from 1910. He knows how the code works on 3 groups:

1 – 2 – 3 Notes and processes. In the 3<sup>rd</sup> line started from left corner. ABC down line DEFH.

If the first is to be

A(1) with vertical line;

B is 1 surrounded by 2 vertical lines and;

He was able to complete the reading of the coded message and translated into bislama. The coded message in Bislama was:

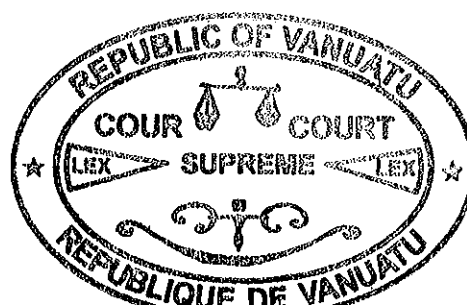
*"Nem sek blong mi Kasimir.*

*Yumi tu putum se yumitu drunk tusker after yumitu slip hemi 4.30.*

*Hemia nomo nem sek blongmi*

*God be i blessem mi."*

He said prisoners all over the world used codes so that other people could not read code. He was asked and he wrote his name using the code form and signed it [Exhibit P10].



Mr Chris King is a competent and creditworthy witness.

That is the end of the prosecution's evidence and the end of the prosecution case.

## VII - PRIMA FACIE CASE AND RIGHTS OF ACCUSED

At the end of the prosecution case, a ruling was made in accordance with section 164 of the Criminal Procedure Code Act (CPC) [CAP.135], that a prima facie case was made out against the accused, Jack Nalau, and he was required to put forward his defence.

In this trial, at the close of the prosecution case, in compliance with section 88 of the Criminal Procedure Code Act [CAP.136], the Court read and explained to the accused his statement of rights:

*"In making your defence in this trial, you are entitled, in addition to calling other persons as witnesses, to give evidence yourself on your own behalf, upon oath or affirmation and subject to cross-examination by the prosecution. However you are not obliged to give evidence and may elect instead to remain silent. If you do not choose to give evidence, this will not of itself lead to an inference of guilt against you."*

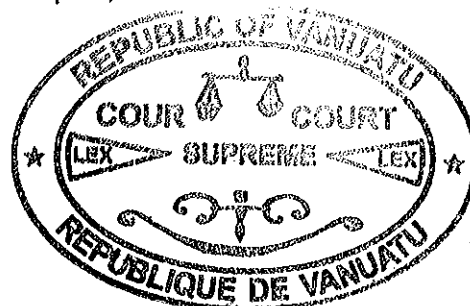
## VIII - DEFENCE CASE

The accused, Jack Nalau, elected to neither give evidence himself nor call any evidence.

## IX – DISCUSSION ON EVIDENCE

The evidence established that the injuries which caused the deaths of the two victims were not self-inflicted. That the two victims were unlawfully killed by a person or persons is established by the medical evidence. The Statement of Dr Basil McNamara and accompanying Autopsy Report (Exhibit P 4 — admitted by consent) established beyond reasonable doubt that the two victims, Zai Lin ZHU and Tang MEIYU died as a result of the unlawful acts of a person or persons who had unlawfully entered the dwelling house where the victims lived, and where their bodies were found after death. In relation to the two victims, Dr McNamara, in the Autopsy Report, concluded that:

**Re: Zai Lin ZHU**



*'There was a depressed skull fracture to the superior orbital plate above the right eye. The fracture was circular in shape and was approximately 30 mm in diameter. The fracture to the skull penetrated into the skull cavity and brain. There was a further fracture to the superior orbital plate above the left. This fracture was also circular in shape and was approximately 30 mm in diameter. This fracture to the skull also penetrated into the skull cavity and brain.'*

*The wounds to the head of the deceased were caused by a blunt instrument with a circular face of approximately 30 mm in diameter.'*

**Re: Tang MEIYU**

*'There was a depressed fracture to the superior orbital plate above the left eye. The fracture was circular in shape and was approximately 30mm x 30mm in diameter. The fracture to the skull penetrated into the skull cavity and brain. There was a further depressed fracture to the left side of the skull. This fracture was kidney shaped. The rear of this fracture displayed a circular shape with a diameter of approximately 30 mm. These injuries are depressed skull fractures and also penetrated into the skull cavity and brain.'*

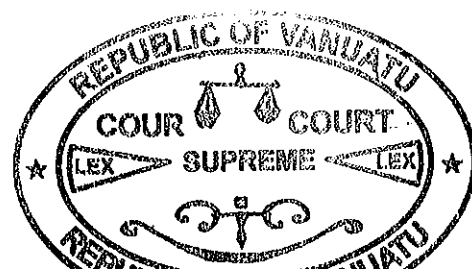
*The three wounds to the left side of the head to the deceased were caused by a blunt instrument with a circular face of approximately 30 mm in diameter.'*

In his statement, Dr McNamara expressed the opinion that:

*'I concluded that the primary cause of death was brain injury secondary to multiple blows to the head caused by a blunt instrument.'*

A bloodied hammer was located at the crime scene. This hammer had a head which was 30 mm in diameter. The blood found on the hammer was consistent with the blood of the victims. The prosecution submitted that the court would find, beyond reasonable doubt, that the hammer was used to inflict the injuries to the victims which caused their deaths.

As stated above, the only real issue in this case is this: Has the prosecution proved, beyond reasonable doubt, that the Accused was the killer (or one of the killers) of the two victims? The prosecution submitted that the circumstantial evidence



adduced at the trial establishes beyond reasonable doubt that the Accused was the killer (or one of the killers). The prosecution submitted finally that an examination of the circumstantial evidence leads to the conclusion that there is no reasonable hypothesis consistent with the Accused being innocent of these crimes.

In the present case, the following circumstantial evidence pointing to the Accused as being the killer (or one of the killers)

A - The fingerprint evidence

With respect to these crimes, there was no eyewitness who saw what happened or who observed who was responsible. However, the compelling circumstantial evidence proves conclusively that the Accused was the killer (or one of the killers).

The most damning prosecution evidence establishing the identity of the Accused as the killer (or one of the killers) is the unchallenged, uncontradicted fingerprint evidence adduced at the trial.

The Court heard evidence from Thomas Christian Stoewer, who produced a Statement and accompanying Report (Exhibit P 6) and through whom photographs taken by Esrom Molisa (Exhibit P 7) and photographs referred to in Mr Stoewer's Report (Exhibit P 8A and P 8B) were tendered. In relation to this case, Mr Stoewer gave unchallenged, uncontradicted evidence that he identified and collected a number of fingerprints from inside and around the dwelling home occupied by the two victims, in and around the areas where their dead bodies were discovered. Mr Stoewer gave unchallenged, uncontradicted evidence that the fingerprint samples he located and collected were sent to Canberra in Australia for comparison and analysis.

The Court heard evidence from Lissa Dinning, who was, at the material time, a Scientific Officer employed by the Australian Federal Police at Canberra. Miss Dinning produced a Statement and accompanying Report (Exhibit P 1) and series of photographs (Exhibits P 2 and P 3). Miss Dinning was provided with the



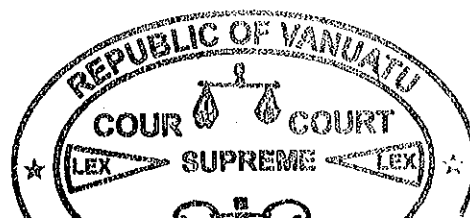
fingerprint samples identified and collected by Mr Stoewer. She was also provided with a number of fingerprint forms relating to other witnesses and suspects for the purposes of comparison. Of particular significance in this case, Miss Dinning was provided with fingerprints of the Accused. According to the evidence of Jack Weller, an officer of the Vanuatu Police Force, he took the fingerprints of the accused in relation to another matter on 4 June 2006.

Miss Dinning gave unchallenged, uncontradicted evidence that, in her expert opinion, after comparison and analysis, it was her view that the Accused's fingerprints were located at various points in and around the crime scene, namely:

- The exterior of the rear passenger side window of the vehicle parked in the yard (the left ring finger) — see Exhibit P 1 at page 5;
- The exterior of the rear passenger side window of the vehicle (left middle finger) — see Exhibit P 1 at page 5;
- The exterior of the front passenger door of the vehicle (left palm print) — see Exhibit P 1 at page 5;
- On the bed base in which the two dead bodies were found, at the upper rung (right middle finger) — see Exhibit P 1 at page 5;
- On the bed base, at the upper rung (right ring finger) — see Exhibit P 1 at page 5;
- On the bed base, at the upper rung (right little finger) — see Exhibit P 1 at page 5;
- On the blood stained hammer (right ring finger, 2<sup>nd</sup> joint area) — see Exhibit P 1 at page 6;
- On the blood stained hammer (right ring finger) — see Exhibit P 1 at page 6. (Emphasis added)

Miss Dinning testified that the fingerprints of all persons are unique to that person. That is, no two sets of fingerprints are identical (not even as between identical twins). Miss Dinning was definite about this fact and there was no challenge to her evidence, nor any evidence led to contradict her evidence on this point.

**Officer Delphine May Vuti** of the Vanuatu Police Force gave evidence that she interviewed the Accused, particularly in relation to the evidence that his fingerprints



were located at the crime scene. The record of interview was tendered as Exhibit P5. The Accused (as was his right) declined to answer questions. As such, he has given no innocent explanation as to how his fingerprints were left at the crime scene and, most particularly, on the bloodied hammer.

B - The DNA evidence

The court heard evidence from Miss Shelley Fountain, a Forensic Biologist employed by the Australian Federal Police. Miss Fountain produced a Statement and accompanying Report (Exhibit P 11) and records of the buccal swab taken by Delphine May Vuti of the Accused (Exhibit P 12) and blood samples of the two victims (Exhibit P 13).

Miss Fountain testified as to the significance of DNA comparison and analysis. In relation to this case, her conclusions are contained at pages 23 - 25 of Exhibit P 11. Ms Fountain found DNA evidence pertaining to a mixture of individuals. She expressed the opinion that these findings, when considered in isolation from other information, provide moderately strong support for the proposition that Zhuzai LIN, Tang MEIYU and Jack NALAU are the source of the mixed DNA profile obtained from the following item:

Item 19 – Swab of apparent bloodied finger marks from the bed base upper rung (158228). Her conclusions were unchallenged and uncontradicted. It is noted that she was not cross examined at all.

In this case, the Court is asked to receive and accept the result of scientific test. When a Court has to form an opinion upon a point of science, the opinions upon that point of persons especially skilled (Experts) in such science are relevant facts. This means that the Court will allow the admission of the result of the scientific test and, the testimony of experts to help interpret the result or part of the testing process leading to the result. However, there must be need for circumspection. Before the Court allows a scientific test of fingerprint or DNA to be admitted in evidence, the Court should ascertain whether the entire process leading up to the production of the result bears up to close scrutiny. Although, no one doubts the immense value of



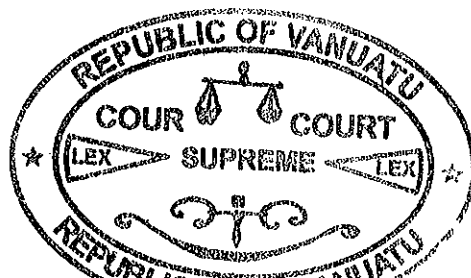
*[Handwritten signature]*



Fingerprint and DNA evidence and their use in criminal trials, questions should be raised. Were ironclad standards for gathering the Fingerprints and DNA samples put in place? At all, if it were the "wrong" man's fingerprint or DNA samples that was sent for the test then, all the sophisticated technology in the world will not produce a credible result. Further, have industry standards or international protocols regarding how fingerprint and DNA samples should be extracted and stored, how the tests should be carried out and how many times the test should be repeated, what training the technicians (Experts) who perform the test should have received, what equipment they should have used, who should have interpreted the results and the method of analysis they should have used, all been fully complied with? Where there has been a lapse in any step in the process, the Court should carefully consider whether it is safe to admit the evidence at all or, if thought safe to admit the evidence, how it should cross-check the result against other evidence that might corroborate or undermine the test result.

The need for circumspection in this regard is amplified because admitting a badly obtained fingerprint or DNA test result is highly prejudicial to an accused person or another. It is, therefore, only fair to admit fingerprint or DNA test where the Court is convinced, after careful scrutiny of the process of obtaining it, that the result bears up to rigorous standards and thus credible. We all do well to remember that, while scientific process and technology can be perfected, it is the participation of human beings in the process and their judgment leading to the result of the test that are possible weak links. It must therefore be proved to the Court's satisfaction that rigorous standards on how to contain these flaws have been scrupulously observed in the very process that produced the result that the Court is being asked to receive. No Court in Vanuatu should admit any fingerprint or DNA test result, without this preliminary examination of the process of obtaining the result.

In the present case, after hearing the evidence on the process of searching, examining, collecting and identifying fingerprints and the DNA test and upon reading the reports filed by Mr Thomas Stoewer and Ms Dinning on Fingerprint evidence, and Ms Fountain's on DNA evidence, I am satisfied that each of these witnesses are



experts in their respective field, they have each met the required expertise qualifications. I am also satisfied about the explanation of the detailed process they followed and the protocols put in place leading up to the results of the fingerprint and DNA test results and conclusions they each made in their reports.

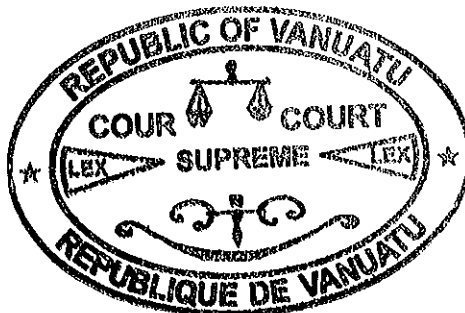
Therefore, the Court accepts beyond reasonable doubt that the Accused, Jack Nalau, was present at the crime scene, touched the vehicle parked outside, touched the bed base on which the victims' bodies were found and handled the blood stained hammer which was the murder weapon (or one of the murder weapons). Significantly, the witnesses Stoewer and Dinning gave evidence that the Accused's fingerprints were located within the bloodied area of the handle of the hammer. This is compelling evidence of guilt.

Further the DNA evidence, in combination with the medical evidence of Dr Basil McNamara, establishes beyond reasonable doubt that the bloodied hammer was a weapon used to commit the homicides of the two victims. The finding of the mixed blood sample, in combination with the fingerprint evidence of Mr Stoewer and Miss Dinning, establishes beyond reasonable doubt that the Accused came into contact with the bed base of the bed in which the two victims were found dead.

In this case, the scientific evidence is further corroborated with the evidence of consciousness of guilt.

#### C - Evidence of consciousness of guilt

The court heard evidence from two custodial officers employed by Corrective Services (Mr Tom Frank and Mr John Jack George) and from one technical adviser employed by Corrective Services (Mr Chris King). There was unchallenged, uncontradicted evidence that, a short time prior to this matter being listed for trial, the Accused attempted to have a coded message (Exhibit P 9) sent to another detainee of the Correctional Centre, Markwin, asking him to provide a false alibi for the Accused.



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The only inference that is available to the court in relation to the coded message is that the Accused wished to establish a false alibi for his trial and that he was motivated to do so because of a consciousness of guilt.

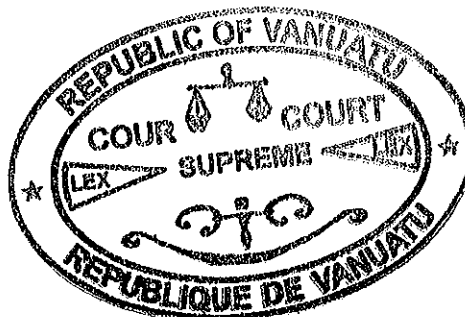
Evidence relating to a 'consciousness of guilt' is a form of circumstantial evidence recognised in common law jurisdictions throughout the world. Such evidence can take the form of lies told out of a consciousness of guilt or evidence of flight from the jurisdiction or, as in this case, an attempt to create a false alibi. In England in **R v Lucas** [1981] QB 720, Lord Lane CJ held that certain lies amounted to corroboration of the prosecution case. His Lordship stated (at 724):

*"To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness."*

In Australia, the High Court elaborated on these principles in **Edwards v The Queen** [1993] HCA 63. In the joint judgment, Deane, Dawson and Gaudron JJ held:

*"But not every lie told by an accused provides evidence probative of guilt. It is only if the accused is telling a lie because he perceives that the truth is inconsistent with his innocence that the telling of the lie may constitute evidence against him ((27) Eade v. The King (1924) 34 CLR, at p.158.). In other words, in telling the lie the accused must be acting as if he were guilty. It must be a lie which an innocent person would not tell. That is why the lie must be deliberate. Telling an untruth inadvertently cannot be indicative of guilt. And the lie must relate to a material issue because the telling of it must be explicable only on the basis that the truth would implicate the accused in the offence with which he is charged. It must be for that reason that he tells the lie. To say that the lie must spring from a realization or consciousness of guilt is really another way of saying the same thing. It is to say that the accused must be lying because he is conscious that "if he tells the truth, the truth will convict him" ((28) Reg. v. Tripodi (1961) VR, at p.193.)."*

This Court accepts the two cases referred to above as a guide and apply them in this case.



The evidence of the coded message which the Accused attempted to have forwarded to Markwin meets the criteria established in *Lucas* and *Edwards*. It was a deliberate act, relating to a material issue, motivated by a realization of guilt and a fear of the truth. It was not an action that an innocent person would have done, particularly as it was written in a secret code. Finally, it is shown by other evidence to have been clearly false (this is demonstrated by the fingerprint and DNA evidence which established that the Accused was present at the crime scene).

## X - THE LAW AND ITS APPLICATION

Could the Accused be convicted on circumstantial evidence?

There is no rule of law that a person cannot be convicted solely on circumstantial evidence. In many cases, offenders do not commit their crimes in the presence of eyewitnesses. They do so in order to try and avoid detection. It is often said that circumstantial cases can be stronger than cases relying on direct evidence. In **Blackstone's Criminal Practice** (1995) at page 1777 the author stated:

*"Circumstantial evidence is to be contrasted with direct evidence. Direct evidence is evidence of facts in issue. In the case of testimonial evidence, it is evidence about facts in issue of which the witness claims to have personal knowledge, for example, 'I saw the accused strike the victim'. Circumstantial evidence is evidence of relevant facts, ie, facts from which the existence or nonexistence of facts in issue may be inferred. It does not necessarily follow that the weight to be attached to circumstantial evidence will be less than that to be attached to direct evidence. For example, the tribunal of fact is likely to attach more weight to a variety of individual items of circumstantial evidence, all of which lead to the same conclusion, than to direct evidence to the contrary coming from witnesses lacking in credibility."*

In **Chamberlain v The Queen** (No 2) (1984) 153 CLR 521, Brennan J held (at page 599):

*"The prosecution case rested on circumstantial evidence. Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. First, the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to an inference based upon particular facts then the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts which the jury finds. The drawing of the inference is not a matter of evidence: it is solely a function of*



the jury's critical judgement of men and affairs, their experience and their reason. An inference of guilt can safely be drawn if it is based upon primary facts which are found beyond reasonable doubt and if it is the only inference which is reasonably open upon the whole body of primary facts."

Also in **Chamberlain**, Gibbs CJ and Mason J wrote (at pages 535-6):

"It follows from what we have said that the jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, but in the light of the whole evidence, and that they can draw an inference of guilt from a combination of facts, none of which viewed alone would support that inference. Nevertheless the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt.

When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case... in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence."

In **Swanson v. Public Prosecutor** [1998] VUCA 9; Criminal Case No.06 of 1997 (26 June 1998); the Court of Appeal said:

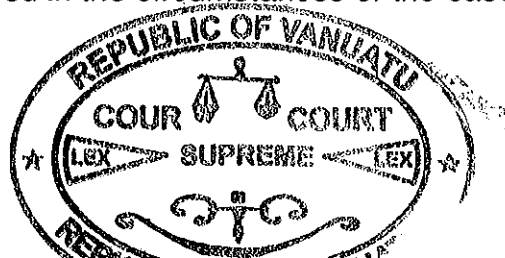
"This was a case where the prosecution was based wholly in circumstantial evidence. The accused could be convicted only if guilt is the only reasonable inference open on the facts.

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

Inferences need not to be irresistible. The prosecution is not required to disprove any inference that the ingenuity of counsel might devise. It must exclude any reasonable hypothesis based on the evidence which is consistent with innocence, but no more. **R. v. Laugalis** (1993) 1.0 CRNZ 350, 359. To similar effect is Section 8 (1) of the Penal Code Act [CAP 135] which mandates proof beyond reasonable doubt but states that "the determination of proof beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous".

In a circumstantial evidence case, where the accused makes no statement out of Court and/or elects not to give evidence, inferences can be drawn from the absence of any explanation from the person "with unique knowledge of the complicated dealings to which the charges relate".

The limits of the right to draw inferences from an accused's silence are discussed in such cases as **Trompert v. Police** [1985] 1 NZLR 357 and **Weissersteiner v. R.** 119931 HCA 65; 119931 117 ALR 545. It is basically a matter of common sense to be used in the circumstances of the case. See



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***Haw Tua Tau v. Public Prosecutor*** [1982] AC 136, 151, 153. (a Judge-alone criminal trial)." [See further application in ***PP v. Joseph*** [1999] VUSC50, CRC 004 of 1994 (15 December 1999)].

In the present case, the Court does not criticize the accused for exercising his right to remain silent and the Court does not rely on the accused's silence as a basis for drawing adverse inferences against the accused. The Court does not need to do so because the other inferences discussed already amply justified the convictions. However, since the inferences are available to be drawn from unchallenged evidence, this case provided a suitable occasion for the drawing of inferences adverse to the accused, stemming as a matter of common sense from his lack of any explanation.

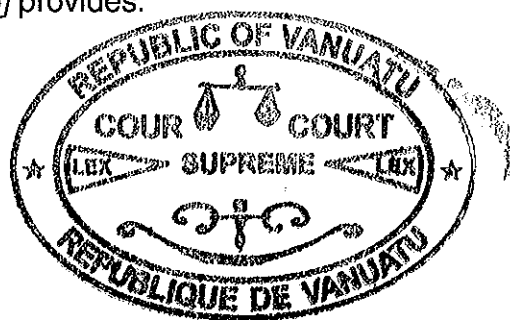
There are no reasonable hypotheses consistent with innocence in the present case. This is an overwhelming case based on unchallenged, uncontradicted scientific evidence which establishes beyond reasonable doubt that the Accused was the killer of the two victims (or one of the killers of them). The presence of the Accused's fingerprints on the handle bloodied hammer leads to only one conclusion: he was the person who used it to kill the victims. As such verdicts of guilty are returned against him.

The next question is: Was the Intentional Homicide Premeditated or not?

The sole remaining question is whether the Accused should be convicted of the Premeditated Intentional Homicide of the two victims or of the alternative charges of Intentional Homicide. The court must decide this question by drawing inferences on the evidence.

In this case, there is evidence that the victims were tortured before their death, probably to ascertain from them where money or other valuables were located. The evidence of the torture is found in the presence of full skin cigarette burns to the bodies of the victims.

Section 106(2) of the *Penal Code* [CAP 135] provides:



*"(2) For the purpose of subsection (1), premeditation consists of a decision made before the act to make a homicidal attack on a particular person or on any person who may be found or encountered."*

The killings were particularly brutal. The victims were killed by the blunt trauma associated with being struck repeatedly with the hammer. The inference that should be drawn by the court is that the Accused made a decision before the act to make a homicidal attack on the occupants of the house. As such, the verdicts of guilty to the counts of Premeditated Intentional Homicide are returned against the accused, Jack Nalau.

In this trial, the prosecution established beyond reasonable doubt that the Accused, Jack Nalau, was guilty of the Premeditated Intentional Homicide of the two victims, Tang Meiyu and Zhu Zai Lin and of the unlawful entry of the dwelling occupied by them. The verdicts should therefore be:

**XI - CONCLUSION: VERDICTS**

- Count 1: Premeditated Intentional Homicide: Guilty
- Count 2: Intentional Homicide: No verdict required
- Count 3: Premeditated Homicide: Guilty
- Count 4: Intentional Homicide: No verdict required
- Count 5: Unlawful Entry to Dwelling House: Guilty

The Accused, Jack Nalau, you have 14 days to appeal your convictions if you are not happy with them.

**DATED at Port-Vila this 18<sup>th</sup> day of October 2010**

**BY THE COURT**

**Vincent LUNABEK  
Chief Justice**

