

**PUBLIC PROSECUTOR**

**V**

**PETER HOLI VARASMAITE**

*Hearing:* 21 September 2011  
*Before:* Justice Robert Spear  
*Appearances:* Simcha Blessing for the Public Prosecutor  
Felix Laumae for the Accused

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**JUDGMENT OF THE COURT**

**Application to vacate pleas of guilty**

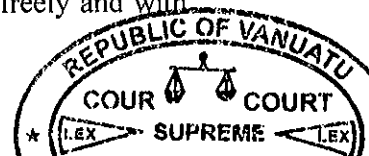
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1. The prisoner Peter Holi Varasmaite applies to vacate pleas of guilty that he entered on 7 June 2011 to two charges:-
  - a. *Count 1* – Possession of Firearm with intent to injure *section 26 Firearms Act [Cap 198]*.
  - b. *Count 2* – Attempted Intentional Homicide *sections 28 and 106 Penal Code Act [Cap.135]*
2. The case was on track for a sentencing hearing but diverted to deal with the application now advanced.
3. Mr Laumae has made no secret of his intention, if his application is successful, to encourage the prosecutor to amend the charge of attempted intentional homicide to one of intentional causing injury.
4. The prosecution case is that these charges arise out of a general dispute that was raging between certain people in the prisoner's village on Epi. Matters were brought to a head one Sunday morning. At a time of high emotions, the prisoner picked up a shot gun and fired it at two people who were having a verbal joust with his father. Some of the shot hit the complainant on the front of his body and in particular around the area of his jaw although fortunately it appeared that no lasting damage was caused. The other man received a superficial cut from the shot. There is some uncertainty as to the distance



between the prisoner at the time he fired the shot gun and the complainant, That distance has been narrowed down to being between 30 and 50 feet.

5. Mr Laumae acted for the prisoner during the preliminary hearing in the Magistrate's Court. However he was overseas at the time that the prisoner appeared in the Supreme Court following committal. He arranged for Mr James Tari to represent the prisoner. The sworn statement of the prisoner is that Mr Tari advised him to plead guilty to the charges and that if he did so "*the Court would be lenient with me to impose lower sentence*". The prisoner goes further in his sworn statement and says that when Mr Laumae returned from overseas, he indicated to the prisoner that he would consult the public prosecutor about a review of the charge to one of "*attempted intentional homicide*". That is an obvious typographical mistake which Mr Laumae now recognises. It is accepted that it was his intention to persuade the prosecutor to charge the accused instead with intentional assault causing injury as the lead charge.
6. Mr Laumae argues that the advice that the accused received was insufficient. However, there is no evidence as to what advice he did receive except, as menetined, that he would receive a lenient sentence if he pleaded guilty.
7. The prisoner goes further and says that he now realises he should not have pleaded guilty to the charge of attempted intentional homicide as "*I had no intention to kill the victims. I just want to injure them with the rifle for their disobedience to tabu placed by the paramount chief of the village on the reefs of sea in our village*".
8. This application to vacate plea is opposed by the public prosecutor.
9. An application to vacate plea in the end is to be considered having regard to the overall interests of justice. First and foremost, this Court is required to ensure that those who are brought before, charged with criminal offences, are treated fairly and justly. Be that as it may, it is well recognised that an application to vacate plea should not be allowed as the matter of course. In this respect see *R v South Tameside Magistrates' Court: ex parte Rolland [1983] 3 All E R, 689*  
  
*"that to allow a change of plea was a matter for our absolute discretion, and that once an unequivocal plea had been entered the discretionary power should be exercised judicially, very sparingly, and only in clear cases"*
10. Accepting that as the approach to be adopted by this Court, it is necessary simply to observe that applications to vacate pleas of guilty are generally viewed having regard to two principle considerations.
11. The first consideration relates to the circumstances surrounding the entry of the plea. That often raises the question as to the adequacy of advice provided to the accused at the time the decision was made to enter a plea of guilty.
12. The second consideration is whether there is indeed any matter that can be advanced as a defence. It would be futile, and a waste of the resources of the State, for an accused to be allowed to vacate a plea, entered freely and with



the benefit of adequate advice, if there was no proper bases upon which he could defend the charge.

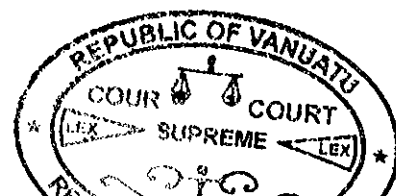
13. I have already mention that there is no evidence from the accused relating to the adequacy of the advice he received from Mr Tari except that the Court would impose a lesser sentence to recognise an early plea of guilty. Be that as it may, I accept also that this accused is relatively unsophisticated and that these are very serious charges. Furthermore, given Mr Laumae's absence, and what I can assume to be the unexpected (by Mr Laumae) assumption of responsibility on the part of Mr Tari to advise as to plea, if all other considerations were equal then the application would be allowed.
14. However, the point that defeats the application is in respect of the second consideration identified above. The accused is essentially seeking to defend the charge of attempted intentional homicide on the grounds that he had no intention to kill - only to injure. The prisoner in his own sworn statement said that he just wanted, *to injure them with the rifle*.
15. There is no other evidence, as I understand the case, which would go towards proof of an intention to kill except the circumstances of the offending that I have outlined above. However the law of Vanuatu provides that a criminal intention can be proved also by recklessness:

***Principles of Criminal Law***

**6. Criminal intent, recklessness**

- (1) *No person shall be guilty of a criminal offence unless he intentionally does an act which is prohibited by the criminal law and for which a specific penalty is prescribed. The act may consist of an omission, or a situation which has been created intentionally.*
- (2) *No person shall be guilty of a criminal offence unless it is shown that he intended to do the very act which the law prohibits; recklessness in doing that act shall be equivalent to intention.*
- (3) *A person shall be considered to be reckless if—*
  - (a) *knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk; and*
  - (b) *it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present.*
- (4) *A person shall not be guilty of a criminal offence if he is merely negligent, unless the crime consists of an omission. A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation should exercise.*
- (5) *No provision of law constituting a criminal offence shall be construed as dispensing with the necessity to prove the criminal intention of the accused, unless such construction is expressly stated or arises by necessary and distinct implication.*  
(emphasis added)

16. The intention here is to cause the death of the complainant.



17. In my view, firing a shot gun, from a distance between 30 and 50 feet at people with whom you are very angry and wanted to injure, must at least be accepted as being a reckless act in the sense that the injuries intended could be life-threatening. The prisoner has not attempted to say how seriously he intended to injure the complainant but it must be taken that he knew that the very act of firing a shot gun at them from such a distance as 30 to 50 feet carried with it the real risk of serious if not fatal injuries. As a matter of common sense, how the shot would strike the target could not be judged by the prisoner such that he could have any confidence that he would only cause injuries. I fail to see how it could be advanced on behalf of the prisoner, if allowed to take this to trial, that he had an arguable or reasonable defence to the charge of attempted intended homicide. Indeed, I consider that the State has a very strong case against him for attempted intentional homicide.
18. In any event, I doubt whether it would make any difference at all whether the accused is sentenced for attempted intentional homicide or the charge favoured by Mr Laumae of intentional assault causing injury. Attempted intentional homicide (non-premeditated) carries with it a maximum sentence of 20 years imprisonment. There is no statutory limitation on the maximum sentence in Vanuatu for an attempt to commit a crime as there is, for example, in New Zealand. However, it can be safely accepted in my view that a charge of attempted intentional homicide in Vanuatu is likely to be treated at much the same level as against the principal offence as is required in New Zealand with certain clear exceptions. Of course, the circumstance of such offending can vary widely but 10 years is likely to be considered the maximum term for all but the most exceptional cases of attempted intentional homicide as a proportionate response by the Court to the actual offending.
19. As it happens, the offence of intentional assault causing injury carries a 10 year maximum.
20. Accordingly, for sentencing purposes, and particularly given that the intention to kill by the accused own admission would have to be established through recklessness, the sentencing outcome is unlikely to be different between the two charges.
21. For these reasons, the application to vacate plea is declined.

**Peter Varasmaite, you are remanded in custody to appear at 9 am this Friday 23 September 2011 for sentence. I note that the pre-sentence report and counsels' submissions on sentence are already with the court.**

BY THE COURT

