

Registry

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

**Criminal Case No. 06 of 2014**

**PUBLIC PROSECUTOR**

**V**

**JOHN JAMES**

**Coram:** Mrs. Justice M.M.Sey

**Counsel:** Mr. Leon Malantugun for the Public Prosecutor  
Mr. Less Napuati for the Accused

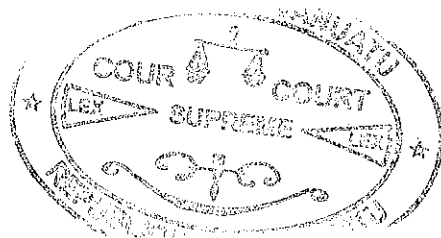
**Date:** 28<sup>th</sup> August 2014

**JUDGMENT**

1. The accused, **John James**, was arraigned before this Court on the 18<sup>th</sup> day of March 2014 charged with one count of Intentional Homicide contrary to section 106 (1)(b) of the Penal Code Act [CAP. 135]. The particulars blong wrong read as follows:

*"JOHN JAMES, sometime between 18 August 2013 mo 20 August 2013 long La Coline Subdivision, you bin minim blong causen death blong ANGELINE TARI olsem yu bin minim blong assaultem hem wetem wan iron bar mekem se i causem death blong hem."*

2. The Accused pleaded not guilty. Before the prosecution case began, the Court ensured that the accused understood his rights contained in Section 81 of the Criminal Procedure Code [CAP.136] as to the presumption of innocence in his favour.



3. The accused has denied the charge and this being a criminal charge the prosecution which brings the charge bears the burden of proving it beyond reasonable doubt. To do that, the prosecution must produce and call evidence to substantiate the elements of the offence beyond reasonable doubt and, where there is a doubt, that doubt must benefit the accused and be resolved in his favour.
4. To put it simply, the burden of proving the guilt of the accused rests with the prosecution throughout and it never shifts. The leading authority is the case of **Woolmington v DPP** [1935] A.C. 462 HL wherein Viscount Sankey opined at pp. 481- 482 as follows:

*"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt [subject to the qualification involving the defence of insanity and to any statutory exception]. If at the end of, and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

5. This Court is particularly mindful of the said principle enshrined in **Woolmington** especially since the trial of this accused is by judge-alone and not by judge and jury as in some other Commonwealth countries.
6. I am equally mindful of the general rule as to burden of proof in this jurisdiction as it is clearly stated in **section 8 of the Penal Code Act [CAP.135]** as follows:



- "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."*

7. The accused is not obliged or required to prove his innocence or indeed anything at all nor need he call evidence or testify in his defence. This principle is indisputable and as Lord Griffiths said in the case of **R v Richard Hunt** [1987] AC 352:

*"...Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute."*

8. If at the end of the trial there is any reasonable doubt as to the guilt of the accused on the charge laid against him, I must interpret that doubt in favour of the accused and acquit him of the offence charged against him.
9. However, if I believe the prosecution witnesses and I am satisfied beyond reasonable doubt of the guilt of the accused, I must find him guilty and convict him accordingly.

## Relevant Law

10. **Section 106** of the *Penal Code Act* [CAP 135] provides:

*"106. (1) No person shall by any unlawful act or omission intentionally cause the death of another person.*

*Penalty:*

*(a) if the homicide is not premeditated, imprisonment for 20 years;*

*(b) if the homicide is premeditated, imprisonment for life.*

*(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 Prosecution Case

11. The prosecution alleged that the accused murdered the deceased between 10.35 p.m. on 18<sup>th</sup> August 2013 and 4.30 a.m. of 19<sup>th</sup> August 2013 at La Coline subdivision (hereinafter referred to as the "primary crime scene") and that the body of the deceased was discovered at the hillside immediately above chalets built by students of College de Montmartre (hereinafter referred to as the "secondary crime scene").
12. It is further alleged by the prosecution that the accused murdered the deceased with an iron bar that was discovered about 10 metres away from the primary crime scene. Furthermore, that after the assault, the accused dragged the deceased up the concrete path adjoining the subdivisions, up the narrow short cut route to Montmartre plantation, along the road towards the graveyard and the boys' dormitory, down the shortcut towards the chalet, down the slope and placed her body at the secondary crime scene.
13. For the accused to be convicted of the offence of premeditated Intentional Homicide under **section 106 (1)(b)** as charged, the prosecution must prove beyond reasonable doubt each of the following elements:

1. That the accused committed an unlawful act on/upon the body of the deceased.
2. That this unlawful act in actual fact caused the death of the deceased.
3. That the unlawful act committed on the body of the deceased which caused the death of the deceased was premeditated and intentional 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 deceased.

### **Admission of Certain Facts**

14. The following facts as set out by the prosecution were admitted by the accused.

Ms Angeline Tari otherwise known as Angie, (hereinafter "the deceased") is from Ambae. She passed away sometime between 18 August 2013 and 20 August 2013. She was a student of Lycee de Montmartre at the time of her demise. The Complainant, Mrs. Hilda Tari is from Ambae and is the mother of the deceased. She ordinarily resides at Fresh Water.

15. John James otherwise known as Jemo (hereinafter "the accused") is from White Sands, Tanna. He is 19 years of age and is a student of Lycee BAP. He was one of the deceased's boyfriends at the time of the deceased's death. Beside his relationship with the deceased, the accused is engaged to another Tannese woman, Ms Winnie Lawrence who is the mother of his daughter, Lucy.

16. Friday 16<sup>th</sup> of August 2013 was the last day of school of term two for francophone students around Vanuatu including College de Montmartre. Students vacated the school compound and about 6.30pm the dormitories were almost empty. The deceased, albeit a day-boarder, went to school that

day. The complainant picked her up in the afternoon and they returned to her home at Fresh Water. The deceased spent the rest of the Friday afternoon with her family at home.

17. At about 9.00am on Saturday the 17<sup>th</sup> of August 2013, the deceased, her cousin Michael Tari and their uncle Noel went shopping. The deceased commenced corresponding with the accused via SMS and about the same time she also sent SMS messages to her other boyfriend Junior Lonsdale and to her girl friends.
18. The accused, on the other hand spent the afternoon of Saturday 17<sup>th</sup> August 2013 in town at the marriage ceremony of his teacher, Mrs. Justine Malalo. He was continuously texting the deceased during such time. At about 8.30pm, the accused left Blandinier Estate for the home of the deceased. He was drunk at the time.
19. Upon his arrival at Fresh Water, he conversed with the deceased for a while at the road adjacent to the deceased's home and then, upon his request, the deceased went into her room, locked her bedroom, climbed out of the window and followed the accused to Blandinier. The deceased's mother and her relatives were at Fresh Water Green Light Nakamal at the time. According to the complainant, that was the first time ever the deceased had left the house without her permission.
20. The accused and the deceased remained in Blandinier till after midnight. Between 12.30am to 1.30am of Sunday 18<sup>th</sup> August 2013, Mrs. Justine Malalo and her husband dropped them off at Fresh Water Nabanga. The deceased however, did not return home. She was taken by the accused to his house at Pacific Veneer. They managed to hitch a ride at about 3.45am.

and they arrived at Pacific Veneer between 4.00am to 5.00am in the early hours of Sunday morning 18<sup>th</sup> August 2013.

21. The accused's parents got up on Sunday morning 18<sup>th</sup> August 2013 to find that the accused had brought the deceased to their house. The accused's father was furious when he saw the deceased at his house. He disclosed to the deceased the accused's engagement with Ms. Winnie Lawrence and the fact that they have a baby daughter. He then made it clear to the accused that the deceased better not be about the house when he returned from church.
22. Sometime after she had learnt of the accused's affair with Ms. Winnie Lawrence she sent the following text messages to her boyfriend Lonsdale Junior, her best friends Licy Tari, Clemons Tamat, Dominique Naio and John Florentino. She texted words to this effect , "Awo,, mna,, u sta passem wan bnne vacance wntaem.. Mi no sv if bai mi luk u again or.. B mi sta wishim u the best.. Much love.. ..Frm angie...Mwah (Translation: " My friend,, I wish you an enjoyable holiday... I don't know whether I'll see you again or not... but I wish you the best..... Much Love.. From: ange... Mwahh"). When they asked her where she was she responded to this effect " Mi academi wantaim... Mi arem ded emia nm..." ( Translation: "I am at academy... I feel like I am going to die"). They did not suspect anything bad and they took the messages to mean that her parents might have transferred her to another school.
23. At about 3.30pm just before his parents returned from church, the accused hitched a ride for the deceased. The Driver of the vehicle was a Swedish man called Mark Lerch and he and his family were driving from Teouma beach to their residence at Teouma Valley. He was driving a white Hyundai

Hilux with registration No. 7962. Mr Lerch dropped the deceased off at the main road and headed to Teouma Valley.

24. At about 1.30pm on the afternoon of Tuesday 20<sup>th</sup> August 2013, a Catholic Priest by the name of Antoine Tamaraka decided to take a walk to Lololima Plantation. On his way he met his niece and her two children. He made a detour and accompanied his niece and two children to Number 2 Lagoon. Father Tamaraka remained with them at Number 2 Lagoon until he managed to get a ride to town. He then rushed to a relative's house to find out the shortest route to Montmartre as he was late for the afternoon session of the retreat.
25. When the shortest route was pointed out to him, the priest immediately made haste and he followed a very narrow path up the hill. He went off course along the way. He spotted a Natapoa Tree at the top of the hill and walked towards its direction. He knew that the tree is situated beside a chalet within the school's premises.
26. En route he found an orange pocket knife. He took the knife and proceeded onwards. He then came across a tree that fell across his path. When he was about to make his first step over the felled tree, he discovered the body of the deceased just in front of him. He touched the deceased's right cheek but her body was already cold, as a result of which he knew that the deceased had already died. Father Tamaraka rushed to Montmartre and called Bishop Bosco Baremes to inform him about what he had seen. They called the police thereafter.
27. The accused was arrested on the 29<sup>th</sup> August 2013. He was interviewed under caution. He confirmed that he was with the deceased at Justine's marriage on the 17<sup>th</sup> August 2013. He confirmed that the deceased



remained with him at his house at Pacific Veneer on the 18<sup>th</sup> of August 2013 and that by 2.00pm the deceased had already returned to town on a truck belonging to an expatriate. He did not give further account as to his whereabouts after the deceased had left Pacific Veneer except that that was the last time he saw her.

### **Summary of the Prosecution Evidence**

28. To prove their case against the accused the prosecution called twenty-four (24) witnesses. **PW1 Mrs. Hilda Tari** is the mother of the deceased and she and **PW 2 Michael Tari** gave evidence as to the occurrences at their home at Fresh Water on Saturday 17<sup>th</sup> August 2013. **PW3 Mrs. Justine Malalo** is the teacher whose marriage ceremony the deceased and the accused had attended on Saturday 17<sup>th</sup> August 2013.
29. **PW4 Linda Naula** saw the deceased and the accused at the Montmartre plantation between 6 p.m. and 6.30 p.m. on Sunday 18<sup>th</sup> August 2013. **PW5 Timothy Tape** also recalled seeing the deceased and the accused around 4.30 p.m. walking along the road in the vicinity of La Coline village and Number 2 Lagoon. He said the second time he saw them was around 6.30 p.m. when they were on their way back to the school from the Blue store which is just at the area known as Ground Force (now called the Healing Touch Ministry). The witness said he walked past them for the third time and he only asked whether they were going back to the school and then he said "goodnight."
30. On Monday 19<sup>th</sup> August 2013, **PW6 Marie Chantal** saw the accused in the morning around 6.30 whilst she was doing her laundry at home at Number 2 Lagoon. She said the accused was heading to Montmartre and that later whilst on her way to work she saw the accused sitting on a swing behind the classroom at St. Joseph's school and he was looking up to the hill. She said she did not talk to the accused because he was not his usual self and she

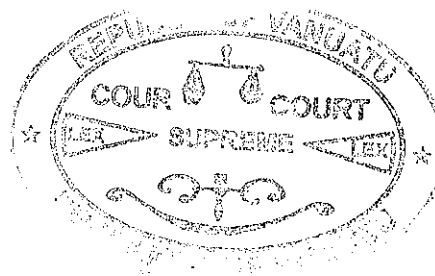
was scared. Under cross examination, it was put to the witness that the accused had accompanied his little brother to St. Joseph's school to collect his report because he attends the school and is in class 4.

31. **PW7 Francois Teilemo** is the chief cook at Lycee de Montmartre. He recalled seeing the accused on Monday 19<sup>th</sup> August 2013 at the school when he had gone to collect his children's reports. He also saw the accused on Tuesday 20<sup>th</sup> August 2013 when the accused approached him in the kitchen and asked whether he had seen Angeline Tari.
32. Some of the other prosecution witnesses were **PW9 Stephane Taviri, PW10 Amontine Kuras, PW11 Oliver Tamasing, PW12 Emile Bong, PW13 Willie Akorie, PW14 Omofrie Tariweu, PW15 Junior Londsdales, PW16 Sharon Taurere, PW17 Enoch Loli, PW20 Terry Lapinpal and PW23 Emily Tamata**. The details of their evidence are contained in the Court record of proceedings. Suffice it to say that I have carefully evaluated their evidence as presented.
33. What follows is a summary of the salient features and relevant parts of the evidence of **PW8 Kilson Tari, PW18 Tony Berry, PW19 George Tuoni, PW21 Dr. Rose Mary Taun Kaltack and PW22 Relvie Matariki**.
34. **Kilson Tari** testified that on Sunday 18<sup>th</sup> August 2013, he left home to go to the store and that he passed by Teouma and took the junction to Club Hippique. He said he saw a girl and two boys standing on the right side of the road and that one boy was sitting down and the other was standing about 1 metre away from the girl whom he recognised as Angeline. He said the boy was wearing a black jacket with a hood and that after he passed them he went back home. On Monday 19<sup>th</sup> August 2013, between the hours of 3 - 4 o'clock in the morning, the witness said he got up early to pray and that he heard a truck that sped past his house. He said that he walked to his other piece of land to pray and as he was praying he heard this loud wailing sound

coming from the other side. He said that he stopped praying and walked to the seashore and he heard a truck's engine going "woou woou" as it revved. He said that he then heard the voice of one woman crying for help and saying "mama" "mama." Then a truck passed and the wailing stopped and after the truck had passed the wailing continued but not for too long. The witness said that he thought that maybe the police had gone after the other vehicle and arrested them and maybe the police had bashed them up and that was why they were crying. Under cross examination, the witness said that he knew Angeline because he is related to her mother.

35. Detective Sergeant Tony Berry gave detailed testimony relating to the investigation. He said the deceased was a female of Melanesian race approximately 160cm in length and roughly 17-18 years old. That the body of the deceased was lying by the hillside with the head facing down the hillside and the legs towards Montmartre School. He said he discovered that there was no blood on the dry leaves, the rope and even on the logs where the body was found. There was also no disturbance on the scene and also where the trees were. He said that in his opinion, he determined that the body had been taken from somewhere else by someone through the road down the hill and placed on a rock.
36. He said that there appeared to be a pool of blood located on a slope concrete and about 2 metres away there were droplets of blood discovered up the concrete road which is connected to the bush road that travels through La Coline area to Montmartre School. There was blood also found on the leaves some metres away on the concrete road off the small bush road from Montmartre School. He said the last droplet of blood was found on taro leaves about 100-200 metres away from Montmartre School. On the bush road up towards Montmartre School he discovered brown chocolate and blue biscuit wrappings and lollies.

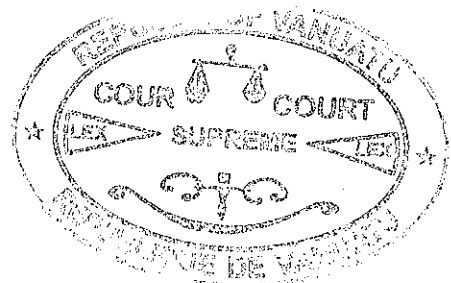
37. The witness went on to state that the iron bar was found about 5 metres away from where the blood was and upon examining the iron bar he found it was one of those markings used to sub divide La Coline plots in the area. He described the iron bar he took from the crime scene as red in colour with triangular sides and bent at the far end and at the top it looked sharp. He said that it was taken as an exhibit to the police station and that upon examination the iron bar was found to be consistent with some of the injuries found on the body of the deceased. He told the Court that the triangular base measured accurately with the mark left on the chest of the deceased and that the far end at the top seemed to be consistent with the open wound on the head of the deceased and the other far end seemed to be consistent with the injuries at the side of the deceased's head.
38. Detective Sergeant Tony Berry went on to confirm that the injuries on the photographs he had taken are consistent with the iron bar and that the measurement on the body is consistent with the triangular shape of the iron bar. The wound itself is consistent with the sharp edge of the iron bar. He said that the injury on the forehead seemed to have been caused by the edge of the iron bar. He stated that the iron bar was the murder weapon and he tendered it in evidence as Exhibit "B18".
39. PW19 is Chief Inspector George Tuoni. He said he could recall Wednesday 28<sup>th</sup> August 2013 and that he was at Montmartre School with the crime scene investigators and that they were discussing the search for Late Angeline Tari. He said that they left the office and reached Montmartre School around 11am and stayed there until 2.00pm and that they were in the Montmartre area about 30 metres away from where the deceased's body was found. He said he started walking along the bush track and he noticed a packet of biscuits. He followed the bush track which led into the bush and he came across a piece of dry log on which he saw some lolly wrappings and when he looked further on the ground he noticed that there was some coffee branch



that had been broken off and left there. He said that he took a closer look at the coffee branches and leaves on the ground and he noticed what appeared to be knee prints which looked as if someone had knelt down and left his knee prints on the ground.

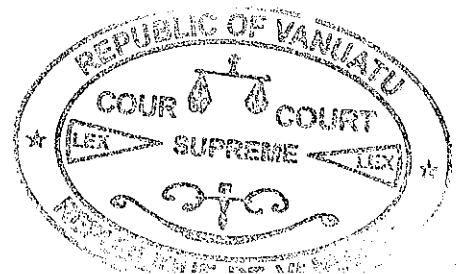
40. The witness said that, according to his analysis of what he saw on that concrete path, it looked like human blood and that it seemed thick where they were standing and it had also flowed about 15 metres and then dried up. He said that was where he left the crime scene investigation in the good hands of Sergeant Tony Berry and he returned to the office and arrived back at around 4.00pm in the afternoon.
41. Medical Superintendent Dr. Rose Mary Taun Kaltack and Doctor Eric Pama of Port Vila Central Hospital were called to the Emergency Department sometimes after 5.00 pm on the 20<sup>th</sup> of August 2013. She said that after examination of the deceased she wrote the Report which was admitted as Exhibit "P21."
42. Relvie Matariki works at Digicel and she produced the phone records for the deceased's mobile number 5985956. She said that the last call received was at 21:27p.m and it lasted for about 7-8 minutes. She said that was the last time the deceased stopped receiving calls or responding to SMS.
43. At the close of the prosecution case, the Court read and explained to the accused his statement of rights in terms of section 88 of the Criminal Procedure Code Act [CAP.136] as follows:

*"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."*



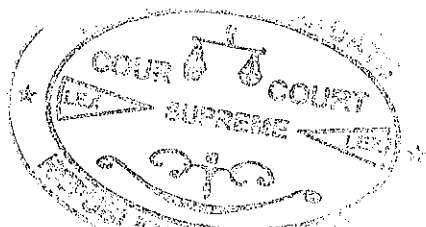
## The Defence Case

44. I shall now turn to consider the defence put forward by the accused person who gave evidence himself on his own behalf upon oath. He called no witnesses.
45. The accused stated that after the deceased boarded the white Bongo, he went home and slept but he was awoken by a phone call from the deceased on a private number. She was crying and saying "Ismael wants to kill me" and she asked him to come and see her at the Club Hippique junction. He said that he went to the Club Hippique junction and when he got off the truck he saw the deceased and Ismael and another boy whom he did not recognize. He said that as soon as the deceased saw him, she ran towards him crying and she hugged him. The accused said Ismael was swearing at the deceased and shouting out words to the effect that she was pregnant with his child and that the family was waiting for her at home and he asked her why she was with him. He stated further that Ismael was wearing a jumper with a hood on it and that he recognized him as he had attended school with him at Montmartre.
46. The accused went on to state that he held on to the hand of the deceased and, as they walked off, Ismael was shouting after them saying "you go but I have to kill one of you." He said he and the deceased were just running across the track to get to safety away from Ishmael. He said he asked the deceased why she had not told him that she was in a relationship with Ismael and that she was having his baby and she replied that she wanted to tell him but she was scared.
47. Testifying further, the accused said they went to Montmartre school to check the classroom doors to see whether any one of them was unlocked for them to spend the night but all of them were locked. He said they came out of the



College de Montmartre down to Lycee de Montmartre to the path leading to La Coline village, down to the main road. He said he told the deceased that they were going to see his mum but she replied that she was scared of his parents. He said he then told her that if she was scared of his parents they should go to Fresh Water to see her parents but the deceased said she was scared of them.

48. The accused said that they went to the Blue store at La Coline village and bought some sweets and lollies. He said the deceased informed him that they should go back to see her aunt called Ines who is residing at Montmartre. They left the store and went back the same way that they had come down along the concrete path from La Coline into the bush road.
49. The accused went on to say that, as he and the deceased were walking towards the bush road, Ismael Jumped out in front of them from the bushes and threw something straight at him aiming for his head. He said he did not know if it was a metal object or a stone but he dived away from it. He said that was when he let go of the deceased's hand and he ran back down towards La Coline and headed back home to Pacific Veneer.
50. The accused said he was scared of Ismael because he had said he was going to kill one of them and, since Ismael had said that the deceased was carrying his child, he was scared that he was going to kill him.
51. Under cross examination the accused denied murdering the deceased as alleged by the prosecution. He confirmed that his evidence in Court was different from his statement given during the police interview. When asked why he did not report Ismael he replied that at the police station he was treated as the main suspect and that was the reason why he remained quiet. He confirmed that he had gone to Armontine Kuras to ask her whether she had seen the deceased and that he had gone to the school to enquire of



Emile Bong and the other prosecution witnesses as to whether they had seen the deceased.

52. As I stated earlier on, the accused does not need to call evidence or testify in his defence. However, the accused elected to give sworn evidence and by so doing he exposed himself to cross examination by prosecuting counsel. His evidence must accordingly be carefully scrutinised by the Court before reaching its verdict.

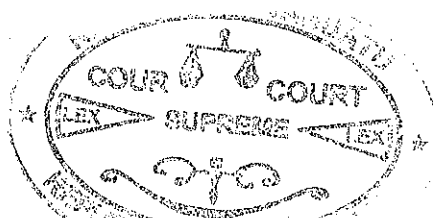
### **Discussion on Evidence**

53. The evidence establishes that the injuries which caused the death of the deceased were not self-inflicted. Further, that the deceased was unlawfully assaulted by a person or persons and that she died as a result of the unlawful acts of a person or persons. The evidence also establishes that the accused John James was with the deceased on 18<sup>th</sup> August 2013 and it places the accused at the primary crime scene and along the way between La Coline village and the plantation at Montmarte.

54. The only real issue in this case is this:

Has the prosecution proved, beyond reasonable doubt, that the accused was the killer? I accept that the prosecution has adduced circumstantial evidence at the trial, but the question is whether this circumstantial evidence has been established beyond reasonable doubt that the accused was the killer?

55. There is no rule of law that a person cannot be convicted solely on circumstantial evidence and it is often said that circumstantial evidence can be stronger than cases relying on direct evidence. In **Chamberlain v The Queen (No 2)** (1984) 153 CLR 521, Brennan J. held (at page 599) as follows:



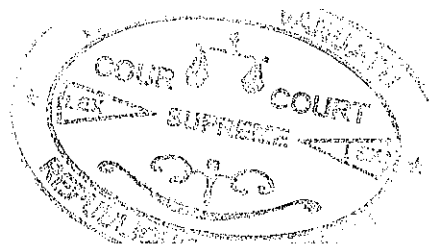


*"The prosecution case rested on circumstantial evidence. Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. First, the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to 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 judgment 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."*

56. In **Swanson v. Public Prosecutor** [1998] VUCA 9, the Court of Appeal said:

*"This was a case where the prosecution was based wholly on 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*

57. In **Reg. v Van Beelen** (1973) 4 SASR, which was a case of murder, the direct evidence was insufficient without certain scientific evidence to permit the case to be left to the jury. The scientific evidence was that certain trace materials (fibres, foraminifera, paint chips and hairs) found on or about the deceased girl were similar to other trace materials found on or about the accused. For example, fibres found on the girl's singlet were said to be similar to those from the accused's pullover. The Court of Criminal Appeal of South Australia said:

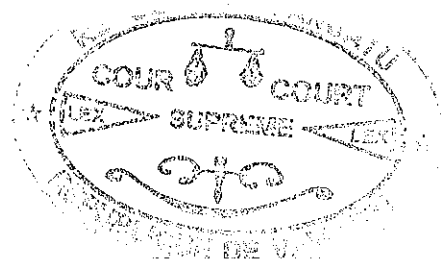


*"It is an obvious proposition in logic that you cannot be satisfied beyond reasonable doubt of the truth of an inference drawn from facts about the existence of which you are in doubt."*

58. 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, i.e, facts from which the existence or non-existence 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."*

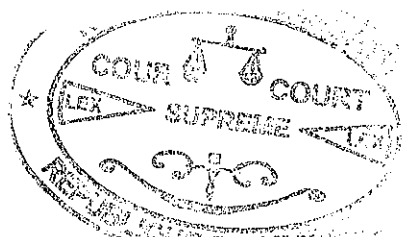
59. In this present case, I find that the evidence is circumstantial and there is no direct evidence linking the accused to the murder. For instance, there were no eyewitnesses at the time of the commission of the offence. Moreover, the pathologist was never called to testify and there is no forensic evidence of blood and/or finger prints from the murder weapon (Exhibit "B18"). In answer to questions posed by defence counsel under cross examination, PW18 confirmed that Exhibit "B18" was never sent for forensic examination. He also said that he did not know of any results or findings of blood samples on clothes belonging to the accused. He said some clothes belonging to the accused were taken to his office and then sent to Australia but that he did not know about any results or findings from Australia regarding the items that were sent. The witness was asked whether he could confirm that the blood on the murder weapon came from the accused and he said "No." Defence counsel asked PW18 and PW19 whether they knew from their investigation who caused the death of the deceased. Both witnesses said they did not know and could not tell the Court who caused the death of the deceased.



60. Moreover, in assessing the evidence, I have examined the Digicel phone records which were tendered by PW22 and it is clear from the extract shown below that the accused placed many calls and sent several SMS messages to the deceased's phone between the hours of 06:00:11 on Monday 19<sup>th</sup> August 2013 and 12:45:36 on Tuesday 20<sup>th</sup> August 2013. The accused's phone number is 6785607669 as can be seen from this extract.

**INCOMING CALLS**

8/18/2013	15:10:10	6785607669	6785377326	SMS		
8/18/2013	15:33:01	6785607669	6785377326	SMS		
8/18/2013	15:34:36	6785607669	6785377326	SMS		
8/18/2013	15:37:32	6785607669	6785377326	SMS		
8/18/2013	15:41:17	6785607669	6785377326	SMS		
8/18/2013	15:42:05	6785607669	6785377326	SMS		
8/18/2013	15:47:34	6785607669	6785377326	SMS		
8/18/2013	16:13:32	6785607669	6785377326	SMS		
8/18/2013	17:17:50	6785607669	6785377326	SMS		
<b>8/18/2013</b>	<b>21:27:59</b>	<b>6785985956</b>	<b>6785377326</b>	<b>Mobile Originating</b>	<b>206.0</b>	<b>Last Call received</b>
8/19/2013	06:00:11	6785607669	6785377326	SMS		
8/19/2013	07:26:12	6785607669	6785377326	SMS		
8/19/2013	07:38:37	6785607669	6785377326	SMS		
8/19/2013	10:49:58	6785607669	6785377326	Mobile Originating		
8/19/2013	11:39:27	6785607669	6785377326	Mobile Originating		
8/19/2013	12:05:28	6785607669	6785377326	Mobile Originating		
8/19/2013	12:35:55	6785607669	6785377326	Mobile Originating		
8/19/2013	13:37:10	6785607669	6785377326	Mobile Originating		
8/19/2013	13:53:48	6785607669	6785377326	Mobile Originating		
8/19/2013	18:17:11	6785607669	6785377326	Mobile Originating		
8/19/2013	19:10:39	6785607669	6785377326	Mobile Originating		
8/19/2013	19:16:41	6785607669	6785377326	Mobile Originating		

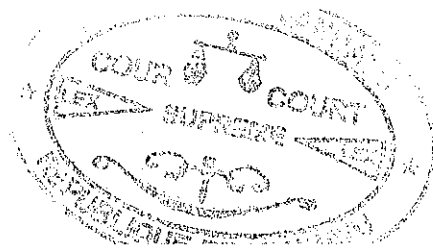


8/19/2013	19:55:47	6785607669	6785377326	Mobile Originating		
8/19/2013	20:15:30	6785607669	6785377326	Mobile Originating		
8/19/2013	20:46:31	6785607669	6785377326	Mobile Originating		
8/20/2013	8:00:18	6785607669	6785377326	Mobile Originating		
8/20/2013	8:52:53	6785607669	6785377326	Mobile Originating		
8/20/2013	09:12:36	6785607669	6785377326	Mobile Originating		
8/20/2013	12:00:06	6785607669	6785377326	Mobile Originating		
8/20/2013	12:45:36	6785607669	6785377326	Mobile Originating		

**OUTGOING CALLS**

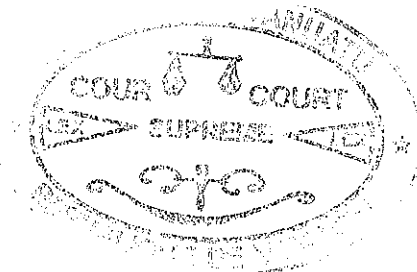
8/18/2013	15:53:10	SMS	6785377326	6785607669	
8/18/2013	16:00:52	SMS	6785377326	6785607669	
8/18/2013	16:02:11	SMS	6785377326	6785607669	
8/18/2013	16:03:12	SMS	6785377326	6785607669	
8/18/2013	16:03:59	SMS	6785377326	6785607669	
8/18/2013	16:05:39	SMS	6785377326	6785607669	
8/18/2013	16:07:22	SMS	6785377326	6785607669	
8/18/2013	16:35:18	SMS	6785377326	6785607669	
<b>8/18/2013</b>	<b>16:46:42</b>	<b>SMS</b>	<b>6785377326</b>	<b>6785607669</b>	
8/18/2013	21:37:42	Mobile Originating Call	6785377326	678555555	Time she stopped answering calls and SMS

61. These phone records also cast doubt in my mind as to the element of proof beyond reasonable doubt. Why would the accused have made all those calls



and sent all those messages to the deceased if he had already killed her as alleged by the prosecution? What purpose would it serve? In any event, it does not appear to me as a calculated move aimed at defeating the course of justice. In fact, I have observed the demeanor of the accused throughout the proceedings and I must say he came across to me as a credible witness and his version of events sounds tenable.

62. I have heard circumstantial evidence from Chief Inspector Tuoni as to how and where the deceased died and there have been speculations and theories from the prosecution that the accused was the last person to see the deceased alive at the time the offence was committed.
63. The prosecution wants me to draw an inference from that evidence that the unlawful act committed on the body of the deceased which caused the death of the deceased was done by the accused and that it was premeditated and intentional.
64. Nonetheless, this is a criminal case where I must be satisfied of this element, like all the others, beyond reasonable doubt. Furthermore, it is my duty to exclude consideration of any possibility or any speculation or conjecture which is merely fanciful or frivolous pursuant to **section 8 (1)** of the **Penal Code Act**.
65. The qualification of premeditation under **section 106 (2)** of the Penal Code is clear. It 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. I cannot view a fact as a basis for an inference of guilt unless at the end of the day I am satisfied of the existence of that fact beyond reasonable doubt.
66. Furthermore, as stated earlier on in this judgment, the evidence is circumstantial and in the complete absence of the pathologist's evidence and report as to DNA analysis of the blood samples taken from the accused, I find that I cannot exclude the possibility that some other unknown person or



persons murdered the deceased. By way of contrast, in the case of **Public Prosecutor v. Nalau** [2010] VUSC 181; Criminal Case 143 of 2009, the Court found that the DNA evidence, in combination with the medical evidence of Dr. Basil McNamara, established beyond reasonable doubt that the bloodied hammer was a weapon used to commit the homicide of the two victims. The Chief Justice said:

*"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."*

### **Conclusion**

67. In light of all the foregoing, I have reached the conclusion that the prosecution has failed to discharge its exclusive burden of establishing the elements of the offence beyond all reasonable doubt.
68. Accordingly, I find that I cannot return a verdict of guilty to the count of premeditated Intentional Homicide against the accused, John James, as charged. I so hold.
69. In the circumstances, the accused is found not guilty and he is hereby acquitted and discharged.
70. I must say that this is a very tragic case especially for the family members who were undoubtedly hoping to get some form of closure with the killer being brought to justice.

**DATED at Port Vila, this 28<sup>th</sup> day of August 2014.**

**BY THE COURT**

  
**M.M. SEY**  
**Judge**

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